TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1919

No. [redacted] 150

B. C. LEE, PETITIONER,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY ET AL.

WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

PETITION FOR CERTIORARI FILED JUNE 24, 1919.

CERTIORARI AND RETURN FILED NOVEMBER 10, 1919.

(26,614)

( )

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. .

B. C. LEE, PETITIONER,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 17, 1918.

STATE OF GEORGIA,
Chatham County:

Be it remembered that at the November 1915 term of the city court of Savannah, his Honor Davis Freeman, judge of said court presiding, there came on to be heard the case of B. C. Lee, plaintiff, against the Central of Georgia Railway and Frank O'Donnell, defendants, the same being an action for damages for personal injuries.

Be it further remembered that upon the trial of said cause the jury empaneled to try the same returned a verdict for the plaintiff which verdict is of record and a part of the record in said case.

Be it further remembered that on the 11th day of November, 1915, during said term of court and within three days from the date of said verdict the defendants moved for a new trial, which motion is in writing and is of record and a part of the record in said cause.

Be it further remembered that on the 18th day of December, 1915, the defendants filed a brief of evidence, which brief of evidence was approved by the court as true and is of record and a part of the record in said cause.

Be it further remembered that on the 17th day of December, 1915, the defendants presented an amendment to its motion for new trial which was allowed by the court and the grounds thereof were approved as true and correct by the said presiding judge.

Be it further remembered that on the 18th day of December, 1915, said motion for new trial came on to be heard and that after argument the court reserved its opinion and on the 14th day of February, 1916, granted a new trial on the second ground of the motion and denied a new trial on each and every of the other grounds of the motion and passed a written order to that effect.

Be it remembered that to the order granting a new trial plaintiff then and there excepted and now excepts and assigns error upon the same and says that the court should have overruled the second ground of the motion for new trial as well as each and every of the other grounds and erred in refusing so to do.

Plaintiff specifies as material and necessary to a proper understanding of the errors complained of the following portions of the record, to wit:

1st. The original petition.

2nd. The amendment to the petition filed July 25th, 1914, with the order allowing the same.

3rd. The answer of the Central of Georgia Railway Company; the answer of Frank O'Donnell; the amendment to the answer of the Central of Georgia Railway Company, together with the order allowing the same; the amendment to the answer of Frank O'Donnell, together with the order allowing the same.

4th. The first verdict of the jury dated February 17th, 1915; the second verdict of the jury dated November 9th, 1915.

5th. The second motion for new trial filed in office November 11th, 1915, together with the order entered thereon.

6th. The amended motion for new trial filed in office December 17th, 1915, together with the order of the court approving the same.

7th. The brief of the evidence introduced upon the second trial filed in office December 18th, 1915, together with the order of the court approving the same.

8th. The judgment and order of the court dated February 14th, 1916, granting the defendants a new trial.

And now comes the plaintiff within ten days from the date of the order granting a new trial and presents this his bill of
4 exceptions, and prays that the same may be certified to be true and that the clerk of the city court of Savannah be directed to transmit to the present October 1915 term of the Court of Appeals of Georgia a true and correct transcript of such parts of the record in said case as are herein specified to be true, to the end that the errors herein complained of may be considered and corrected.

OSBORNE, LAWRENCE & ABRAHAMS,
Attorneys for Plaintiff in Error.

I do certify that the foregoing bill of exceptions is true and specifies all of the evidence and specifies all of the record material to a clear understanding of the errors complained of; and the clerk of the city court of Savannah is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the October 1915 term of the Court of Appeals of the State of Georgia, that the errors alleged to have been committed may be considered and corrected. Feb. 15th, 1916.

DAVIS FREEMAN,
Judge City Court Savannah.

5 In the City Court of Savannah.

I, Thomas S. Russell, Deputy Clerk of the City Court of Savannah, do hereby certify that the within and foregoing constitutes the true original bill of exceptions in the case of B. C. Lee, plaintiff in error, vs. Central of Georgia Railway Company and Frank O'Donnell, defendants in error, filed in the clerk's office February 16th, 1916.

And I do further certify that the January term of the city court of Savannah commenced its session January 3rd, 1916, and that the same is still in session as appears from the minutes of the said court.

In witness whereof I have hereunto set my official signature and affixed the seal of the city court of Savannah, at Savannah, Georgia, this February 21, 1916.

[SEAL.] THOMAS S. RUSSELL,
Deputy Clerk City Court of Savannah.

Due and legal service of the within bill of exceptions and writ of error is hereby acknowledged and all other and further service is hereby waived. Feb. 15th, 1916.

LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attys. for Defendants in Error, Central of Georgia Ry. and Frank O'Donnell.

P. O. Address: Savannah, Ga.

6 Filed in office February 16, 1916. Thomas S. Russell, Deputy Clerk C. C. S.

[Endorsed:] Case No. 7296. Court of Appeals of Georgia, March Term 1916. Lee versus Central of Ga. Ry. Co. et al. Bill of Exceptions. Filed in office Feb. 22, 1916. Logan Bleckley, C. C. A. Ga.

7 STATE OF GEORGIA,
Chatham County:

To the City Court of Savannah:

The petition of B. C. Lee, hereinafter called plaintiff shows as follows, to wit:

1. That Central of Georgia Railway, hereinafter called company, is a corporation owning and operating a railroad in and through said county between Tennille, Georgia and Savannah, Georgia, and in and through Jefferson County, Georgia, and has its principal office in Chatham County, Georgia, and has officers and agents and a place of doing business in Chatham County, Georgia.

2. Frank O'Donnell, hereinafter called engineer, is a resident of Chatham county.

3. Company and engineer where hereafter referred to jointly are called defendants.

4. On the 27th day of September, 1913, plaintiff was 26 years of age. He was employed by the company as a flagman. His earnings were $100 per month and upwards. He was well, strong, in good health and had the prospect of a long and successful career and of increased earning capacity.

5. Plaintiff was employed as a flagman on said date on freight train No. 42 running from Tennille to Savannah. The train
8 crew was composed of engineer Frank O'Donnell, conductor Charles Tarver, brakeman named Walker, and plaintiff. Plaintiff, the company and each of its employes on said train were engaged in interstate commerce.

6. When the train reached Wadley and while the crew were engaged in switching cars it became necessary to make a coupling of the train to some coal cars standing on No. 3 track. The coupling-on the cars were not so maintained that they would couple automatically without the necessity of plaintiff or other employes going in between the cars to couple them. The draw-head on the car attached

to the train would not match the one on the coal car standing on No. 3 track.

7. The conductor whose orders plaintiff was bound to obey ordered plaintiff to couple the cars.

8. Plaintiff signalled the engineer to stop and he stopped when the rear car at the end of the train was within five feet of the coal car.

9. The plaintiff then went and opened the knuckle on the car that was backing up. He tried to shove the draw-head on the car at the rear of the train so that it would match with the draw-
9 head on the coal car, but he could not do so with his hands.

Plaintiff then took hold of a grab iron on the car and placed his right foot on the draw-head of the car that had been backed up Just as plaintiff caught his foot on the side of the draw-head the engineer slammed the cars back. The car struck plaintiff's body and his right foot slid around the end of the draw-head and was caught and so badly mashed that it had to be amputated. So badly was plaintiff's leg shattered that the physicians were obliged to perform three operations upon it, and it is now amputated about half way between the knee and ankle.

10. Plaintiff is permanently injured. His earning capacity is destroyed at least 75%. He suffered, still suffers and will always suffer great pain, both mental and physical. Plaintiff had to stay in the hospital off and on for eight months. The end of his leg at this time is now a painful running sore. Plaintiff has been unable to do any work since his injury and will not be able to work at all for many months to come.

11. Both the company and the engineer knew that plaintiff was between the cars.

12. Under the custom and operating rules of the company
10 which were well known to the engineer and to each of the employes on the train the engineer had no right to move the car without a signal from the plaintiff.

13. The company and the engineer were negligent in all the particulars hereinbefore described.

14. Plaintiff was without fault. There was no other way for him to couple the cars. It was perfectly *safe* for him to endeavor to force the draw-head with his foot while the car was standing still. No person on the train or connected with the train had a right to move the car or to give any signal for the moving of the car except plaintiff, and plaintiff had no reason to expect that the car would be moved except on signal from him.

15. By reason of the injuries aforesaid defendants have damaged plaintiff in the sum of $40,000, which sum they refuse to pay.

Wherefore plaintiff prays that process may issue requiring the company and engineer to be and appear at the next term of the city court of Savannah to answer plaintiff's complaint.

11 Second Count.

And for further cause of action plaintiff shows as follows, to wit:

1. That Central of Georgia Railway, hereinafter called company,

is a corporation owning and operating a railroad in and through said county between Tennille, Georgia, and Savannah, Georgia, and in and through Jefferson county, Georgia, and has its principal office in Chatham county, Georgia, and has officers and agents and a place of doing business in Chatham county, Georgia.

2. Frank O'Donnell, hereinafter called engineer, is a resident of Chatham county.

3. Company and engineer where hereafter referred to jointly are called defendants.

4. On the 27th day of September, 1913, plaintiff was 26 years of age. He was employed by the company as a flagman. His earnings were $100 per month and upwards. He was well, strong, in good health and had the prospect of a long and successful career and of increased earning capacity.

5. Plaintiff was employed as a flagman on said date on freight train No. 42 from Tennille to Savannah. The train crew was composed of engineer Frank O'Donnell, conductor Charles Tarver, brakeman named Walker, and plaintiff.

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6. The company is and was on all the dates named herein, employed in interstate commerce.

7. When the train reached Wadley and while the crew were engaged in switching cars it became necessary to make a coupling of the trains to some coal cars standing on No. 3 track. The couplings on the cars were not so maintained that they would couple automatically without the necessity of plaintiff or other employe going in between the cars to couple them. The draw head on the car attached to the train would not match the one on the coal car standing on No. 5 track.

8. The conductor whose orders plaintiff was bound to obey ordered plaintiff to couple the cars.

9. Plaintiff signalled the engineer to stop and he stopped when the rear car at the end of the train was within five feet of the coal car.

10. The plaintiff then went and opened the knuckle on the car that was backing up. He tried to shove the draw-head on the car at the rear of the train so that it would match with the draw-

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head on the coal car, but he could not do so with his hands. Plaintiff then took hold of a grab iron on the car and placed his right foot on the draw-head of the car that had been backed up. Just as plaintiff caught his foot on the side of the draw-head the engineer slammed the cars back. The car struck plaintiff's body and his right foot slid around the end of the drawhead and was caught and so badly mashed that it had to be amputated. So badly was plaintiff's leg shattered that the physicians were obliged to perform three operations upon it and it is now amputated about half way between the knee and ankle.

11. Plaintiff is permanently injured. His earning capacity is destroyed at least 75 per cent. He suffered, still suffers and will always suffer great pain, both mental and physical. Plaintiff had to stay in the hospital off and on for eight months. The end of his leg at this time is now a painful running sore. Plaintiff has

been unable to do any work since his injury and will not be able to work at all for many months to come.

12. Both the company and the engineer knew that plaintiff was between the cars.

13. Under the custom and operating rules of the com-
14 pany which were well known to the engineer and to each of the employes on the train the engineer had no right to move the car without a signal from the plaintiff.

14. The company and the engineer were negligent in all the particulars hereinbefore described.

15. Plaintiff was without fault. There was no other way for him to couple the cars. It was perfectly safe for him to endeavor to force the draw-head with his foot while the car was standing still. No person on the train or connected with the train had a right to move the car or to give any signal for the moving of the car except plaintiff, and plaintiff had no reason to expect that the car would be moved except on signal from him.

16. By reason of the injuries aforesaid defendants have damaged plaintiff in the sum of $40,000, which sum they refuse to pay.

Wherefore plaintiff prays that process may issue requiring the company and engineer to be and appear at the next term of the city court of Savannah to answer plaintiff's complaint.

OSBORNE & LAWRENCE,
Plaintiff's Attorneys.

15 STATE OF GEORGIA,
Chatham County,
City of Savannah:

B. C. LEE

vs.

CENTRAL OF GEORGIA RAILWAY et al.

To the Sheriff of the City Court of Savannah, Greeting:

The defendants, Central of Georgia Railway and Frank O'Donnell, engineer, are hereby required, personally or by their attorney, to be and appear at the next city court of Savannah, on the first Monday, being the 6th day of July, 1914, next, then and there to answer the plaintiff on the merits of the foregoing petition; as in default of such appearance the said court will proceed as to justice will appertain.

Witness, the Honorable Davis Freeman, judge of said city court, this 22nd day of June, in the year of our Lord, one thousand nine hundred and fourteen.

OSBORNE & LAWRENCE,
Plaintiff's Attorneys.

[SEAL.] THOMAS S. RUSSELL,
Deputy Clerk City Court of Savannah.

Original petition filed in office June 22nd, 1914.

THOMAS S. RUSSELL,
Deputy Clerk C. C. S.

16 Sheriff's Office, City Court of Savannah.

Savannah, Ga., June 24th, 1914.

I have this day served the within petition and process upon the defendant, Central of Georgia Railway Company, by leaving a copy of the same at the office of T. S. Moise, he being the superintendent of said defendant and his office being the usual and customary place of transacting the business of said defendant in this county. The return of

JOHN R. STOFER,
Deputy Sheriff C. C. S.

Sheriff's Office, City Court of Savannah.

Savannah, Ga., June 24th, 1914.

I have this day served a copy of the within petition and process upon the defendant Frank O'Donnell by leaving a copy at his residence, 419 Tattnall Street, same being his most notorious place of abode. The return of

JOHN R. STOFER,
Deputy Sheriff C. C. S.

17 In the City Court of Savannah, July Term, 1914.

B. C. LEE

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY.

The answer of defendant, Central of Georgia Railway Company, to the petition in the above stated cause respectfully shows:

1. Plaintiff admits the allegations of paragraph 1 of the first count of the petition.

2. Defendant denies each and every allegation of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth paragraphs of the first count of the petition.

3. Defendant admits the allegations of the first paragraph of the second count of the petition.

4. Defendant denies each and every allegation of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth paragraphs of the second count of the petition.

And having fully answered, this defendant prays to be hence dismissed.

18 LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attorneys for Central of Georgia Railway Company.

Answer of Central of Georgia Railway Company, filed in office July 3, 1914.

WARING RUSSELL, JR.,
Clerk C. C. S.

19 In the City Court of Savannah, July Term, 1914.

B. C. LEE

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY and FRANK O'DONNELL.

The answer of defendant, Frank O'Donnell, to the petition in the above stated cause respectfully shows:

1. Defendant admits the allegations of paragraph 1 of the first count of the petition.

2. Defendant denies each and every allegation of the second, third fourth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth paragraphs of the first count of the petition.

3. Defendant admits the allegations of the first paragraph of the second count of the petition.

4. Defendant denies each and every allegation of the second, third, fourth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth paragraphs of the second count of the petition.

And having fully answered, this defendant prays to be hence dismissed.

LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attorneys for Frank O'Donnell.

Answer of Frank O'Donnell, filed in office July 3, 1914.

WARING RUSSELL, JR.,
Clerk C. C. S.

20 B. C. LEE

vs.

CENTRAL OF GEORGIA RAILWAY CO.

The plaintiff amends each count of his petition by adding a paragraph as follows:

The engineer knew that plaintiff was between the cars making a coupling. The engineer knew that the coupling was defective as

described in paragraph 6 of the first count and paragraph 7 of second count. By the exercise of ordinary care the engineer could have known that the coupling was defective, as described in paragraph 6 of the first count and paragraph 7 of the second count.

OSBORNE & LAWRENCE,
Plaintiff's Attorneys.

Allowed:
DAVIS FREEMAN,
Judge City Court of Savannah.

Amendment to petition, filed in office July 25th, 1914.
THOMAS S. RUSSELL,
Deputy Clerk C. C. S.

21 In the City Court of Savannah, February Term, 1915.

B. C. LEE

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY et al.

And now comes the defendant, Central of Georgia Railway Company, and with the leave of the court amends its answer heretofore filed to the petition in the above stated cause as follows:

5. The defendant admits the allegations of paragraph 5 of the first count of the petition and paragraphs 5 and 6 of the second count of the petition.

6. Defendant strikes the word "fifth" in paragraph 2 of its original answer, and the words "fifth," "sixth" in paragraph four of its original answer.

7. Further answering the petition, defendant says that at the time of the injuries alleged to have been received by the plaintiff, as set forth in the first count of the petition, this defendant was a common carrier by railroad, engaged in interstate commerce, and the said plaintiff was then and there employed by defendant in such commerce. Defendant alleges that if any liability exists on its part to said plaintiff under the first count of the petition, such liability arises under and rests solely upon the Act of Congress of the
22 United States, approved April 22nd, 1908, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," known as the Federal Employers' Liability Act; and defendant says that to allow the joinder of this defendant, Central of Georgia Railway Company, with the defendant, Frank O'Donnell, as joint trespassers or joint tort feasors in a case arising under said Act of Congress, is unlawful and is a denial of the right and privilege of this defendant, Central of Georgia Railway Company, to have its liability to the plaintiff, if any exists, measured and determined solely and exclusively by the Federal Employers' Liability Act.

8. For further answer defendant says: That to allow the plaintiff to join as defendants in one suit or action, this defendant, Central of

Georgia Railway Company, and Frank O'Donnell, as joint trespassers under laws of the State of Georgia, is, under the facts alleged in said first count, an interference with or regulation of interstate commerce by virtue of State statutes and is in violation of Article 1, Section 8, of the Constitution of the United States, and of the Act of Congress approved, April 22, 1908, passed in pursuance thereof, known as the Federal Employers' Liability Act.

23 LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attorneys for Defendant.

STATE OF GEORGIA,
County of Chatham:

Personally appeared A. R. Lawton, who, being duly sworn, deposes and says that he is Vice-President of Central of Georgia Railway Company, defendant in the above stated cause; that at the time of filing the original answer in said cause said defendant did not omit the new facts or defense set out in the foregoing amendment to its answer for the purpose of delay, and that the said amendment is not now offered for delay.

A. R. LAWTON.

Sworn to and subscribed before me this February 15, 1915.
DAISY SHUMATE,
Notary Public, Chatham County, Georgia.

Amendment allowed as to paragraph- 5 and 6 and disallowed as to paragraphs 7 and 8 because the defenses therein made were covered by the demurrers upon which the court has already ruled adversely to defendants.

DAVIS FREEMAN,
Judge City Court of Savannah.

Amended answer of Central of Georgia Railway Company, filed in office February 16, 1915.

THOMAS S. RUSSELL,
Deputy Clerk C. C. S.

24 In the City Court of Savannah, November Term, 1915.

B. C. LEE

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY and FRANK O'DONNELL

And now comes the defendant, Frank O'Donnell, and with leave of the court amends his answer heretofore filed in the above stated cause as follows:

5. Defendant admits the allegations of paragraph 5 of the first count of the petition and of paragraphs 5 and 6 of the second count of the petition.

6. Defendant strikes the word "fifth" in paragraph 2 of his original answer, and the words "fifth" "sixth" in paragraph 4 of his original answer.

7. Further answering, this defendant says that at the time of the injuries alleged to have been received by the plaintiff as set forth in the first count of the petition, the Central of Georgia Railway Company, one of the defendants herein, was a common carrier by railroad and engaged in interstate commerce and the said plaintiff was then and there employed by defendant in such interstate commerce. This defendant was likewise at that time employed by said railway company in such interstate commerce. Defendant alleges that if any liability exists on the part of the defendant, Central of Georgia Railway Company, to said plaintiff for said injuries, such liability arises under and rests solely upon the Act of Congress of the United States approved April 22nd, 1908, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," and the amendments thereto, known as the Federal Employers' Liability Act; and this defendant says that said plaintiff has no right of action against this defendant under said Federal Employers' Liability Act, and that there is no right or authority under said Act of Congress to join as defendants, or as joint trespassers, or joint tort feasors, this defendant and said Central of Georgia Railway Company, in a case arising under said Act; and defendant says that to allow the joinder of this defendant with the Central of Georgia Railway Company as joint defendants, or joint trespassers, in a case arising under said Act of Congress, is unlawful and is a denial of the immunity of this defendant from liability to the plaintiff under the Federal Employers' Liability Act.

8. For further answer, this defendant says that to allow plaintiff to join as defendants in one suit or action this defendant and the Central of Georgia Railway Company, as joint trespassers, or joint tort feasors, under the law of Georgia is, under the facts alleged in the first count of the petition, an interference with the regulation of interstate commerce by virtue of State statutes, and in violation of Article 1, Section 8, of the Constitution of the United States, and of the Act of Congress approved April 22nd, 1908, passed in pursuance thereof, known as the Federal Employers' Liability Act.

And this defendant, having fully answered, prays to be hence dismissed.

LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attorneys for Defendant Frank O'Donnell.

STATE OF GEORGIA,
Chatham County:

Personally appeared Frank O'Donnell, who being duly sworn deposes and says that at the time of filing of his original answer in the above stated cause he did not omit the new facts or defense set out

in the foregoing amendment to his answer for the purpose of delay and that the said amendment is not now offered for delay.

FRANK O'DONNELL.

Sworn to and subscribed before me this 8th day of November, 1915.

27 JOHN F. LIVINGSTON,
Notary Public, Chatham County, Georgia.

Amendment allowed as to paragraphs 5 and 6. Disallowed as to 7 and 8 because the defenses therein made were covered by the demurrers upon which the court has already ruled adversely to defendants. Nov. 8, 1915.

DAVIS FREEMAN,
Judge City Ct., Sav'h.

Amended answer of defendant Frank O'Donnell, filed in office November 8, 1915.

THOMAS S. RUSSELL,
Deputy Clerk, C. C. S.

28 *First Verdict.*

Savannah, Ga., February 17, 1915.

We, the jury, find for the plaintiff in the sum of Twelve Thousand Dollars ($12,000) against defendants jointly.

N. P. CORISH, *Foreman.*

Second Verdict.

Chatham Co., Ga., Nov. 9th, 1915.

We, the jury, find for the plaintiff in the sum of Thirteen Thousand Five Hundred and Eighty-three Dollars ($13,583).

E. W. BARNWELL, *Foreman.*

29 In the City Court of Savannah, November Term, 1915.

B. C. LEE

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY and FRANK O'DONNELL.

Verdict for Plaintiff.

November 9, 1915,

Central of Georgia Railway Company and Frank O'Donnell, defendants in the above stated case, being dissatisfied with the verdict and judgment therein rendered, now come within three days from

the date of the said verdict and move the court for a new trial upon the following grounds, to wit:

1. Because the verdict is contrary to evidence and without evidence to support it.

2. Because the verdict is decidedly and strongly against the weight of evidence.

3. Because the verdict is contrary to law and the principles of equity and justice.

4. Because the verdict is excessive.

Whereupon, movants pray that these grounds for a new trial may be inquaired of by the court, and that a new trial be granted them.

LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attorneys for Movants.

50 *Rule Nisi Read and Considered.*

It is ordered that plaintiff, B. C. Lee, show cause before me in the City of Savannah at 10 o'clock a. m. on the 18th day of December, 1915, why the foregoing motion should not be granted.

It is further ordered that the said plaintiff, B. C. Lee, or his counsel, be served with a copy of this motion and order instanter, and that this order act as a supersedeas until the further order of the court.

It is further ordered that movants have until the actual hearing of this motion, whether in term or vacation, to prepare and present for approval a brief of evidence herein. This 11th day of November, 1915.

DAVIS FREEMAN,
Judge City Court of Savannah.

Service of the within motion for new trial and rule nisi thereon acknowledged, copy received, and all other and further service or notice waived. This 12th day of November, 1915.

OSBORNE & LAWRENCE,
Attorneys for B. C. Lee.

Second motion for new trial, filed in office November 11, 1915.

THOMAS S. RUSSELL,
Deputy Clerk C. C. S.

51 In the City Court of Savannah, November Term, 1915.

B. C. LEE

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY and FRANK O'DONNELL.

And now comes the defendants, Central of Georgia Railway Company and Frank O'Donnell, and with leave of the court amend the motion for new trial filed by them November 11th, 1915, in the above stated case by the addition of the following grounds:

5. Because the court erred in refusing to give the following charge to the jury in said case, said charge having been regularly requested in writing by the said defendants, to wit:

"The court charges and instructs you that the Federal Employers' Liability Act, upon which this case is founded, does not create any liability for injuries except a common carrier by railroad; it does not make one employe of such a carrier liable to his co-employe, and since the plaintiff has abandoned the second count of his petition, I charge you that he cannot recover in this case against the defendant, Frank O'Donnell, and you must find a verdict in favor of that defendant;"

The error in said refusal to so charge the jury being that
32 the court had instructed the jury that the case was proceeding solely upon the first count of the petition "alleging a cause of action under the Federal Employers' Liability Act," yet by the refusal to charge as requested the court authorized and permitted the jury to find a verdict for damages against the individual defendant, Frank O'Donnell, upon said first count of the petition which alleged a cause of action arising solely upon the Federal Employers' Liability Act of Congress.

6. Because the court erred in charging the jury as follows:

"The plaintiff says that the defendants are liable to him because he contends there was a coupler here which did not meet the requirements of this safety appliance law, and that this alleged violation of the law contributed to his injury, and because, he says, the engineer knew he was between the cars and knew, or negligently failed to know, the coupling was defective, and that, notwithstanding this, the engineer slammed the cars back without a signal from him, thus contributing to the injury;"

The error in said charge being that there was no evidence in the
33 case that the engineer knew of the alleged defective coupling or that he was guilty of negligence in failing to know that the coupling was defective, and this statement of the plaintiff's contention was not authorized by any evidence in the case.

7. Because the court erred in charging the jury as follows:

"If you find from the evidence that the engineer knew that plaintiff was between the cars, and knew, or, by the exercise of ordinary care, could have known that the coupling apparatus was defective, and that, with such knowledge, he slammed the cars backward while plaintiff was between the cars, and that such conduct was not consistent with ordinary care, and that plaintiff could not have avoided injury by the exercise of ordinary care, you would be authorized to find a verdict against both defendants."

The error in said charge being, that there was no evidence in the case that the engineer knew or by the exercise of ordinary care could have known that the coupling apparatus was defective; and the instruction to the jury authorized and permitted them to find a verdict against defendants upon a theory or statement of facts which was not supported by the evidence.

8. Because the court erred in charging the jury as follows:

34 "You will observe, in this case, the company and the engineer are sued as joint tort feasors, wrong doers, and

der for the plaintiff to recover against the railroad company he ust also recover against the engineer in the case. That is to say, it must be because you find the engineer was negligent in one of the ays charged against him, and this negligence concurred with egligence charged against the defendant company. To state it he other way round, if you should find that the engineer is not iable in the case, you will also find that the company is not liable. his is because this court has no jurisdiction if the company alone as negligent. Only in the event you should find that the company as negligent, and also that O'Donnell was negligent, and that the egligence of the two concurred in causing the injury complained f can there be a recovery. There must be either a verdict against oth defendants, or in favor of both."

The error in said charge being as follows:

(*a*) That it illegally authorized the jury to find a verdict against oth defendants as joint tort feasors in a case arising under the Federal Employers' Liability Act of Congress.

(*b*) It improperly authorized the jury to find a verdict against the defendant, O'Donnell, upon a charge of negli- ence against him that he negligently failed to know that the coup- ng apparatus was defective; whereas, there was no evidence in the se that he was negligent in failing to know that it was defective s alleged. Said charge assumed that the jury might find that de- ndant, O'Donnell, was guilty of negligence in more than one way hereas there was no evidence that he was guilty of any negligence, xcept the plaintiff's contention that he moved the cars back without signal.

(*c*) It incorrectly instructed the jury that in order for a plaintiff recover in an action against tort feasors the verdict must be ainst both defendants, whereas, the true rule in such cases is that e defendant may be held liable and the other relieved. This harge had the effect of compelling or coercing the jury to find a erdict against the defendant, O'Donnell, in order to find liability ainst the defendant railroad company.

(*d*) That the petition having alleged separate acts of negligence ainst the railway company alone, in which the defendant O'Don- nell, was not charged with participating, the jury might prop- erly have found under the evidence in this case that the plaintiff's injury was due solely to the negligence alleged ainst the railway company without negligence on the part of the fendant O'Donnell, in which event the defendant O'Donnell uld have been entitled to a verdict in his favor, regardless of the estion of the liability of the defendant railway company. Under s instruction of the court, the jury was compelled to find against defendant O'Donnell in order to render a verdict against the ilway company.

9. The court erred in charging the jury as follows:

"The Congress has enacted a law known as the 'Safety Appliance t,' which makes it the absolute duty of railroads to provide and p proper couplers automatically by impact without the necessity a person going between cars to couple them. So, under this

law, you will observe that if the injury to the employe is contributed to by the violation of this Safety Appliance Act *of* the company is not entitled to a diminution of damages, or to the defense of assumption of risk. The defendant, O'Donnell, however, may urge the defenses of contributory negligence and assumption of risk."

37 The error in said charge being that the court thereby gave the jury a rule of liability which it was impossible to apply in a case under the Federal Employers' Liability Act, and involving the Safety Appliance Act of Congress, against a railroad company and an individual defendant as joint tort feasors. The said charge was confusing and misleading to the jury in that the court did not either in connection with said charge or elsewhere in his instructions explain to the jury how they were to find or arrive at a verdict for damages in one sum against both defendants in a case where one defendant (if guilty of a violation of the Safety Appliance Act of Congress) would be liable for the whole damages sustained by the plaintiff without any diminution for assumption of risk or contributory negligence on the part of the plaintiff; while at the same time the other defendant would be entitled, under the court's instruction, to the defenses of assumption of risk and contributory negligence on the part of the plaintiff.

10. Because the court erred in charging the jury as follows:

"Now, if you find from the evidence that the cars would not, at the time of this occurrence, couple automatically without the necessity of plaintiff going in between the cars, then I charge you

38 that the defendant, Central Railroad Company, was guilty of negligence as a matter of law and could not claim diminution of damages for any contributing negligence on Lee's part, if any, or plead assumption of risk, and would be without any defense to the case, and the plaintiff would have a right to recover the entire damages sustained for any injuries proximately caused by that negligence, if you also find that O'Donnell was negligent and that this negligence concurred with the company's in causing the casualty, unless Lee could have avoided the injury by the exercise of ordinary care, as the statute prohibits the moving of any cars by an interstate carrier which will not couple automatically by impact without the necessity of going between the cars."

The error in this charge being that the court directed the jury to find a joint verdict either for or against both defendants, the defendant, O'Donnell, was by these instructions, illegally deprived of his right to the defense of contributory negligence on the plaintiff's part.

11. Because the judgment signed and entered was not authorized by the verdict in this case. The jury found a verdict for the plaintiff without specifying against which defendant it was ren-

39 dered or whether it was joint verdict against both defendants; whereas, the judgment signed and entered thereon was a joint judgment against both defendants.

Wherefore, defendants pray that these their grounds of amended motion for a new trial be inquired of by the court and that a new trial be granted them.

LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attorneys for Defendants.

The recitals of facts contained in the foregoing amended motion for new trial in the case of B. C. Lee vs. Central of Georgia Railway Company and Frank O'Donnell are hereby approved as true and correct. This December 17th, 1915.

DAVIS FREEMAN,
Judge City Court of Savannah.

Amended motion for new trial, filed in office December 17, 1915.

THOMAS S. RUSSELL,
Deputy Clerk C. C. S.

40 In the City Court of Savannah, November Term, 1915.

B. C. LEE
vs.
CENTRAL OF GEORGIA RAILWAY COMPANY and FRANK O'DONNELL.

Damages.

Verdict for Plaintiff.

Brief of Evidence.

Dr. GEORGE R. WHITE, sworn on behalf of plaintiff, testified as follows:

My name is George R. White. I am a physician and surgeon of twenty years standing. I know the plaintiff, Mr. B. C. Lee. I have treated him. Saw him first, I think the 12th or the 22nd of August, 1914, at my office, in consultation with Dr. Harmon. His leg had been amputated a little above the ankle and the flaps were too short for the bone, the bone was protruding and the lower end of the stump was ulcerated and discharging. The skin was not long enough to cover the bone, and in amputations of that kind you have to cover the bone with skin. It was severe, painful, ulcerating stump. Pus was coming from it. On the 27th of August, in company with Dr. Harmon, we amputated the leg about six inches higher up and cut off the bone and there was a large skin flap, enough to cover the bone, and shortened the nerves and treated the case as we usually do in those cases. He was in the hospital about two weeks, I presume.

41 Cross-examination:

This last operation was entirely successful. It is well now, and the plaintiff can wear a cork leg as far as I know, but I don't know whether he does or not. I performed this operation in August, 1914.

B. C. LEE, the plaintiff, sworn, testified as follows:

My name is B. C. Lee. I was injured while in the employ of the Central Railroad at Wadley, Georgia, on the 27th day of September,

1913. I was the flagman and the other members of the crew were engineer O'Donnell, conductor Tarver, brakeman Walker, a darky fireman, whose name I do not know. Our crew got this freight train at Tennille and left there somewhere between 4:30 and 5 o'clock. Got to Wadley somewhere about 8 o'clock in the morning. It was, approximately, thirty minutes after the train pulled into Wadley when I was injured. I had railroaded before I went to the Central. At the time I was hurt I was twenty-six years of age, and I was good, sound and healthy and had all of my limbs. Had railroaded before with the Atlantic Coast Line as a flagman and served them about two years. From there I went to the Globe Shoe Store, where I
42 worked about three years, and from there I went to the Central and had been there two years at the time I was hurt. I started there as extra and at the time I was hurt I was running regularly. My earnings at the time I was hurt were averaging anywhere from ninety to one hundred and ten dollars. Sometimes run over a hundred and sometimes run up as high as a hundred and ten—between ninety and a hundred. Our wages depended on mileage. Our train was Number 42, and when it pulled into Wadley the conductor and myself were in the caboose. There were somewhere, I guess, like forty odd cars in the train. Walker, the switchman, was riding on the engine. Conductor Tarver told me to see the switches to the main line, that was the first thing, so it would be clear. The conductor told me to go up the left hand side and notice to see if any of the car seals were broken. He went up the other side and we met at the public road crossing. When we got on to the public road crossing the conductor and myself went into the telegraph office. The brakeman had held up four cars and cut the crossing and had gone to the coal chute, about a hundred and fifty yards away, while the conductor and myself went up the side of the train and met at the road crossing. The telegraph office was
43 about, I guess, about forty or fifty yards from the crossing. Tarver went over there to get orders and to get his switch lists of the yard, that is, cars that were to be moved about the yard and to be brought down to Savannah—the number of the cars. Did not stay in the telegraph office but a short time. He got two switch lists and at that time the engine and four cars were backing down the main line and the engineer was ringing his bell, and conductor Tarver looked around at me and said: "Lee go and line up the switches to No. 3 track." He says: "I don't see the brakeman anywhere. He ought to be on the rear of the train but I don't see him anywhere. Line up switches to No. 3 track and make that coupling to that coal car standing on No. 3 track." I had to set No. 1 switch and then threw No. 3 switch. The engineer was backing up slowly. I gave him a back-up signal. I then went to the car standing on No. 3 track that the conductor had pointed out to me, and took hold of the lift lever and tried to open the knuckle on this car. It is an automatic coupler and is raised by this lift lever which projects in to the end of the car and has a handle. If it had been in
proper order there was no need of my going inside. It was not
44 in working condition, the pin wouldn't raise. Did not know

what the trouble was. The train was backing up pretty close and I saw I had to go inside to see what was the trouble and I signalled the engineer to stop which he did. He had been backing at my signal and he stopped at my signal.

Q. About how close was the rear end of the nearest car to you attached to the engine, to the coal car that you were working on?

A. About five or six feet.

I did not go in between those cars until the engineer stopped still. It was then safe for me to go in there and nobody had any right to give any signal whatever except myself. The engineer could not move without my signal. I tried to see what was the matter that the knuckle pin would not come up. Couldn't say whether it was broke or whether it was out of order. I tried to jar it loose and couldn't move it with my hand or with the lift lever. I stepped over to the car that was attached to the engine, five or six feet away, as I wanted to open the knuckle on it. It was not necessary to open both knuckles, I opened the knuckle on this car. The draw-head was loose; swung to the right hand side a distance something like three or four inches and would not have coupled. I had to get this drawhead up in the center so it would match the coal car coupler on No. 3 track. The drawhead and coupler weigh anywhere from 250 to 300 pounds. I could not lift it. It was run up in the back somewheres and swung to the side, kinder wedged, and I was unable to lift it up and get it in the center. I then stepped out from in front of it and went around to the side of it and taken hold of the grab iron on the car that was attached to the engine and put my right foot against the end of the coupler and by pulling with this grab iron and pushing my full weight against it would have been able to bring it up in the center. I got in that position for that purpose; right hand on the grab iron and right foot on the coupler. While in that position the engineer slammed the cars, the end of the car struck me right here on the right hip; this foot (right) slid over the end of the drawhead and was caught in between the couplers. While this foot was caught the brake-rigging jumped up on this shoe here (left) and I was still holding on with my right. I reached down and dragged this (left) foot from out of the brake-rigging to keep me from going under the trucks. I had to drag this foot out to keep from being pulled half in two. This (right) foot was still fastened. I took my hand (left) and dragged this foot from underneath the rigging. The cars rolled seven or eight feet down the track after the train stopped and released my foot and I hopped out on my left foot and fell and lay down on the ground with my face towards the engine—the engine was headed this way. As I got down, the engineer, Mr. Frank O'Donnell, was about ten feet from his engine; he had got down off his engine and was on the ground coming running back towards me. At that time Tarver was standing about fifteen feet from the engine, at the head of No. 2 track. He had two switch lists in his hand. He had both hands over his head as engineer O'Donnell got almost to me and conductor Tarver said "My God Lee what is the matter," and *where* engineer O'Donnell

got to where I was he said "My God boy what a pity" and about this same time conductor Tarver came up and the engineer says to the conductor "My God Charlie didn't you see that boy between those cars" and the conductor says "No, Frank, I didn't see him, didn't you see him." He says: "No, Charlie, he was behind the cars from me, I didn't see him," and the conductor says
47 "we must have a doctor." So he went and got Dr. Holmes and I lay there on the ground. They made me as comfortable as possible. The engineer stayed with me. Those cars did not couple when they came together. They were pushed along six or seven feet. They brought Dr. W. B. Holmes, and as soon as the doctor came up he says "How did this happen" and the engineer says "I don't know." He says: "I think he got under the wheel" and the conductor spoke up "I think the wheel got him too." He says: "There is no eye-witnesses; didn't anybody see it" and they both acknowledged that neither of them saw the accident, in the presence of Dr. Holmes. They commenced looking on the ground. After they said the wheel did it I said no wheel did it; it was caught between the couplers. They put me on a stretcher and carried me over to the drugstore, where I stayed until about 3 o'clock in the afternoon when I was brought to Savannah on the train, putting me here at 6:25 railroad time. At Wadley was up over the drug store in a kind of operating room. When the doctor reached me that morning he gave me morphine and taken me over *the* and got all of his instruments ready to perform the operation.
48 I guess the operation was performed about 11:30 or 12 o'clock. They kept me there until No. 2 passenger train was due in Wadley, something about 3:15. They amputated the shattered bone right about the shoe top. That operation was performed by Dr. Holmes at the drug store. They brought me to Savannah and turned me over to Dr. W. W. Owens and I was in the hospital here about three weeks—until October 18th. I seemed to get better and I would heal up except one little hole about the size of a lead pencil in the end of the leg. I couldn't tell right at the time I left the hospital but there was a little skin that was over the scar and that didn't shed off until two or three days after I went home. I went home about October 18th, and as soon as I left the hospital I went to Dr. Owens and he gave me a discharge slip to the superintendent pronouncing me well. So I went home and stayed two or three days and I noticed that it commenced to get sore and to swell and commenced to running and paining me, and I had to go back to him and he said there was a little stitch or something in there, which would get well, and sent me back home, and it still kept paining me, and I kept going back to him. Went to
49 him the month- of October and November, and the last of November I commenced getting worse pain and the hole was becoming larger, enlarging all the time, and the pain was very severe. I went to the Superintendent's office, Mr. Wright, and told him my condition and he called up Dr. Owens over the telephone and had a conversation with him. He told me I must go back and

see Dr. Owens again and I done like he said. I went back to see Dr. Owens again and on the first day of January, it was the day before January in the afternoon, he says I want you to go out to the Savannah Hospital, I have got to do a slight operation. He says it is not much of an operation, about fifteen minutes, and he says you will be al- right. I went down and on the first day of January I was operated on by Dr. Owens and Dr. Lee. I was put to sleep about 12 o'clock to be operated on and I stayed on the operating table one hour and thirty minutes, and they gave me something like—they told me afterwards—four or five cans of ether, anaesthetic, and I was operated on then. I never knew anything more until about 10 o'clock that night. I stayed in the hospital for about two and a half or three weeks and I come out and went home and the wound healed partly up and wouldn't get any bet-
50 ter. Commenced paining me really worse than ever before. I went up to Dr. Owens, January, February and up to the first of March. Then I made a suggestion to him to let me go to Montgomery, Alabama; that I had heard of two good doctors over there; the company's doctors, claimed to be special surgeons, R. S. Hill and L. L. Hill. He consented for me to go and I did. I wasn't there but a few days and they made a suggestion; said your limb is in a very bad condition and we don't think you will ever get well unless you have a part of that bone amputated, because, he says, it is too much bone and not enough flesh to protect it. It ought to have been cut a little higher up. There is not enough protection of flesh to cover that bone to enable you to stand enough pressure to wear an artificial limb. They told me they would have to perform this operation for it to get well. Well I come back to Savannah and went back to Montgomery about the 11th day of March, and when I went back they performed the operation; amputated, I think, something like one and half or two inches of bone, and fixed it all up, and in about four days after this operation the doctor was dressing it and a blood vessel broke
51 loose—the blood vessel that runs in the center of the big bone in the leg. I like to have bled to death before they could get it stopped; I was bleeding very fierce and was so weak they were undecided to put me to sleep or not. Three doctors, R. S. and L. L. Hill and Dr. Anderson, took hold of me and stopped it from bleeding and after that they took a little operating scissors and cut those stitches and held me by main force, and got hold of this bone and pulled it wide open so as to get down in this big bone and clamped the artery with steel forceps, blood vessel forceps. They pulled the flesh back from around it and took a couple of stitches in it and fastened those forceps up in there. They let them stay inside and told me to be very careful and not to move for three or four days, try to keep in one position, because they told me if I move it was liable to pull the artery loose and go to bleeding. It commenced healing up, healing very slowly, and about ten days after that—one night—about 1 or 1:30 o'clock I happened to wake up and it had broke loose on me the second time and had bled so

much it had the sheets covered with blood, just like they were dipped in a tub. I felt something quite wet on the bed. I slipped
52 the blankets to see what was the matter and I saw the sheets were all bloody. I rang the bell for the nurse. They were undecided whether to unwrap it or not. That was about 1:30. Don't know how long it had been bleeding. I know I was very weak and had lost nearly all the blood I had in me and could hardly turn over. They thought it had got clodded and wouldn't bleed any more; so they left me alone. Dr. Hill came about 9 o'clock in the morning and he looked at it and they told him how it was and everything. He examined it and says I don't believe I will open it; it is not bleeding now. If I open and unwrap it we are liable to have serious trouble. I will leave it like it is for three or four days until it kinder heals and you won't have any more trouble with it. If it does break loose again I will take you to the operating room and perform another operation. But better let it stay like it is for three or four days. After he let it stay that way three or four days he unwrapped it and it was not bleeding any. So he dressed it and it kinder healed along until it healed up to a place about as large as a thumb nail and finally, after that, I got
53 able to get up and get out in a rolling chair. I stayed in that hospital two months and twenty odd days, in Montgomery, and when I did get able to leave I come back to Savannah, but I wasn't well when I come back. I had nothing but a painful running sore. The nerve and everything, the flesh had broke loose and fell out until the nerves were exposed, almost see the nerves in the proud flesh down in the sore and it kept getting worse and worse. When I come back to Savannah I went back to Dr. Owens again. I was still getting worse and decided the best thing I could do, if I wanted to live, was to get my own doctor and get well. So I got Dr. White and Dr. Harmon. I went to Dr. Harmon I think sometime about the 10th or 15th of August, 1914. He told me to go see Dr. White, and those two doctors performed the fourth operation. Was then in the hospital eight days and went home. In about three weeks time the wound was healed up sound completely and shed off. Of course, it was a little tender, but it had practically healed clean up. Don't know exactly the time, but it was several months before I could use a cork leg. Sometimes I wear a cork leg and sometimes it begins to chafe and blister and I have to
54 take it off. I have to keep crutches. I was in the care and custody of the railroad people from the time of my injury, in September 1913, until August 1914. During that time people talked freely with me. They asked me to make a statement as to the fact and I made it in writing, and signed it. It was made in Savannah something like three or four months after I was hurt. The paper handed me is a copy of the statement. During the time from September 1913 to September 1914, I was not able to do any work. I suffered severe pain. It has only been right recent that I have been able to do anything. Have tried to work during the last eight or ten months, and I am able to do a few little things. I

have a job at present. It is on trial basis, whether I can give satisfaction or not. It is with the Globe Shoe Company, and my wages is about thirty-five dollars a month. I may have worked one or two days in the afternoon before this. I cannot do any railroad work any more; could not do the work of a conductor. My service, as far as railroading is concerned is destroyed. The average earnings of a freight conductor are from one hundred and thirty-five to one hundred and sixty dollars per month. I was in line of promotion for that position, if I proved fit.

55 Cross-examination:

Before I went to the Central I had been employed by the Globe Shoe Company. I am employed by them now on trial; have been there a week or so. Had worked for some other shoe concern on Saturday afternoons. I don't know that it has been slack with the shop keepers since the war. I know it is especially hard for a cripple-man to get a position. I explained that I came here on crutches in order that the jury might see my leg. My leg wasn't well last February.

Q. On the day after your last trial you were out on the street with a cork leg?

A. Why, no, sir.

Q. Is it not true that you went down Bull Street the day after the last trial of this case in February—Barnard Street?

A. I believe I did have one, but I had both crutches along with me. I couldn't walk without my crutches.

It is not a fact that I walked with a cork leg, without crutches, the day after the last trial. Don't use crutches in the store. At the time I made that written statement a settlement was not mentioned
56 at all. Never expected the company to pay me damages until I got well. I made this statement exactly like it happened. Not because I was making a statement to sue by. I was not very guarded in making this statement. I had some member of my lodge present. That's the statement Mr. Osborne showed me. I never refused to make a statement. I did say that Dr. Holmes said, when he got up to me "How did this happen" to the engineer and conductor and *told* the engineer spoke up "I think the wheel ran over him" and the conductor followed his explanation "I think he must have got caught under the wheel." Dr. Holmes said: "You haven't got any eye-witnesses." Both of them acknowledged there were no eye-witnesses and neither of them saw how it was done.

Q. In your testimony on the stand, when you testified on the trial of this case last February, did you say a word about these gentlemen, the conductor and engineer, having a conversation in the presence of Dr. Holmes and admitting to him there were no eye-witnesses?

A. I did say Dr. Holmes wanted to know how it happened.

Q. You haven't answered my question, I am talking about when you were on the stand on the trial of this case before, did you
57 say a word about it?

A. Yes sir, I did. I am sure of that.

I did say that Dr. Holmes wanted to know how it happened and that the engineer and conductor were there and stated that positively neither one of them saw it. I said that last February, and I swear to that. The train I was on originated at Macon and I took the train at Tennille. Wadley is, I think, about one hundred and seven miles from Savannah and is in Jefferson county.

This road crossing, where the cars were cut, is west of the depot at Wadley and about forty yards from the depot. I went up the left hand side of the train and the conductor the right. The engineer had cut the road crossing and gone on down to the coal chute. The main part of the train was on the passing track, which has a curve at each end. Where the cars were cut off the track was straight. When Mr. Tarver and I came out of the telegraph office the engine, with the cars had come back on the main line. This coal car was standing on No. 3 track. The car coming back and the stationary car were coal cars. When the train got back on this lead which goes into No. 3 track I was trying to adjust the bumper on
58 the stationary car; trying to open the knuckle by the lift lever. The engineer was coming back slowly and I gave him a stop signal when he was about seven or eight car lengths away. He stopped within five or six feet.

Q. That is, the end of the bumpers were five or six feet apart?

A. Yes, sir.

When he stopped I went in between the cars as I couldn't open the knuckle by the lift lever and I couldn't jar it loose. I made four or five efforts to get the knuckle open. I went to the car attached to the engine and opened that knuckle. Tried to move the bumper with my hands and it was so heavy. Was standing right in the center of the track. When I couldn't lift this up in the center I stepped around to the side (indicating) and saw the draw-head was swung off to one side. I was on the engineer's side but in between the car track and got hold of the grab iron on that side and put my foot up against this bumper to push it over; it was three or four inches over to my side. I had my foot placed against it and was pulling in that position (indicating with hand on grab iron and right
59 foot up) and the cars slammed back and struck me on the hip and this foot (right) slid over the end of the draw-head and it was caught in between. It slid over the top around the end of the bumper, the way the car was going. After the brake-rigging bounced up on my shoe, I still held on with this hand and held up my left foot from going under the brake-rigging and pulling me half in two. My right foot was mashed completely all to pieces. I hopped out from between the rails and the cars rolled a distance of seven or eight feet. I could see what the engineer and conductor were doing as my face was towards the engine. The conductor was a distance of about fifteen feet from the engine. I knew there was nobody there but myself and the engineer and conductor because I went down in the yard and could see there was nobody there when I made this coupling. Didn't see anybody anywhere around while I was fooling with this lever and trying to work it. Saw Mr. Sasser, the section foreman, before I went down in there to make this coup-

ling. From where I was hurt to the depot I guess it is something like one hundred and twenty-five or one hundred and forty yards. The railroad company gave me the services of its surgeons and paid all of my hospital expenses in Savannah and Montgomery.
60 I had heard that the Doctors Hill were able surgeons, and, as far as I know, they gave me the most skillful services they were capable of.

Q. In your petition and in your evidence you have described the action of the engineer, when you were between the cars, as a slamming back of the engine with those cars—what did you mean by that?

A. I mean the cars come back very quick; that the cars slammed back. Engineer O'Donnell stopped on my signal and saw me go in between and nobody had a right to give him a signal but me and I did not come out at all. Those are railroad rules that when a man goes in between cars nobody can give the engineer a signal but the man himself. No one was present except the engineer and conductor Tarver. I am on friendly terms with Mr. O'Donnell, and, as far as I know, he has no enmity towards me and no desire or wish to injure me. This is also true of Conductor Tarver.

Q. Without any rhyme or reason Mr. O'Donnell did slam this engine right back and mashed your foot?

A. Yes, sir, the cars were slammed back. That's the way it occurred.
61 Did not hear the conductor or anybody holler when I raised my foot to push this bumper. It is not true that I waved the engineer down, went in between the cars and adjusted the bumper and then waved the engineer back. It is not true that just as the bumpers got together I put my foot up to kick one of them into place.

Redirect examination:

I was in Savannah when this statement was made to the Central Railroad people; in the red office building on West Broad Street. It was made to Mr. Hitchcock or Mr. Findlay, who is the Chief Claim Agent of the Central. A train man by the name of Connors was present, one by the name of Parker and Mr. Hitchcock, and another gentleman and myself.

Q. He asked you in reference to certain statements you have made in reference to what Dr. Holmes said at the time?

A. Yes, sir.

Q. You say on the stand he made certain statements in the presence of Tarver and O'Donnell?

A. Yes, sir.

Q. You have stated that you stated that at the red building?
62 A. Yes, sir.

Dr. Holmes lives at Wadley, Georgia; a passenger train passed there today at 3:15 railroad time. Another train passes there in the early morning and gets into Savannah about 7:25 I believe it is.

Counsel for plaintiff offered in evidence the annuity tables in 70th Georgia Reports.

Plaintiff rests.

C. F. TARVER, sworn on behalf of defendants, testified:

My name is Charles F. Tarver, am thirty-three years old and on September 27th, 1913, was employed as freight conductor on the Central; through freight service. Have been employed there eleven years and am still there. I was conductor on the freight train on which Mr. Lee was flagman at the time of his injury. The train runs through Macon to Savannah but Tennille is the relay point. We had the average freight train of cars that morning. When we got to Wadley we pulled in the side-track on account of the local freight occupying the main line. When we pulled in the side track why we cut off the engine and some of the cars along with it and the engine went to the coal chute. We generally have to open
63 the road crossing if we have more cars than will clear it. I had some switching to do and when the engine got back why I switched from the main line to the side track. I had some Savannah cars mixed with the Wadley cars, cars to leave at Wadley. We always go in the telegraph office for orders before we leave; generally do that the last thing. After I had switched the Wadley cars, I told Mr. Lee to line up the switches to No. 3 track and to make a coupling to a car standing in the clear in No. 3 track. This he did. In coming back into No. 3 track, Mr. Lee gave the signals to come back. I saw Mr. Lee just at and prior to the time of his accident. He signalled the engineer to stop when within about a car length of the coal car. After the engine stopped he went in to adjust the knuckle, but I don't know on which car. I was standing three or four car lengths from Mr. Lee and saw him go in between the cars after signaling the engineer to stop. When stopped cars were about ten feet apart and then Mr. Lee went in to make some adjustment. I was looking at him and saw the accident. He came out and waved the engineer back. He was standing right at the head of the car to be coupled to, the stationary car, and, as
64 the *the* cars came together, he reached up and had the grab-iron of each car, the one car moving and the car that was standing still—he reached up and got hold and put up his foot to kick at the knuckle or bumper—the knuckle is part of the bumper. As he grabbed the iron and started to kick I hollered to him. It is a dangerous practice and is against the rules of the company. He said he heard me after the accident. The engineer heard me. Mr. Lee said he heard me in the presence of Dr. Holmes and Mr. O'Donnell the engineer. When he raised his foot to kick the knuckle or bumper those cars were just about to couple. The grab-iron is right on the end of the car. The engineer was at his post on the engine, coming back slowly to make the coupling. After the accident Lee let go and fell out from the cars on the engineer's side and I ran to him and saw his foot was mashed and I went for a

doctor immediately. There was a small piece of leather on one of the bumpers. The engineer, myself and section foreman that was standing nearby all got there about the same time.

Q. While Mr. Lee was on the ground, immediately after his injury, state whether or not it is true that you and Mr. O'Donnell each inquired of the other whether you had seen him and each of you said No you had not seen him?

65

A. I had no words with anybody as to who saw him.

I had no conversation with O'Donnell in Dr. Holmes' presence or in the presence of anybody else, while Mr. Lee was lying there, to the effect that there were no eye-witnesses to the accident and I did not know how it happened. I never said I didn't see him when he went in between the cars. Never heard Mr. O'Donnell make any such statement. I never was in any doubt as to how it happened, as I witnessed the accident. Mr. O'Donnell was on his engine looking at his giving signals. Lee, himself, after going in between to adjust the coupler came out and signalled the engineer to come back.

Q. It is contended in this case Mr. Tarver and testified to by Mr. Lee, that, after he signalled the engineer to stop and did stop, he went in to make an adjustment and before he came out and before he could give any signal, and, without any warning whatever, the engineer slammed the *engineer back, the* cars back against him, and caught his foot?

A. No sir, there wasn't any rough handling at all.

66

Q. I mean before he came out and before he had given any signal?

A. No, sir.

Q. Mr. Lee says that while he was lying there on the ground that the engineer started towards him from the engine and when he got up pretty close he said "My God, boy, what a pity," and he says that about the same time I looked up and saw the conductor standing at the head of No. 1 track with two switch lists in his hand, that he threw his hands up over his head and hollered "My God, Lee what's the matter," and then came over to him. He further says that just as the engineer came up, speaking to you "Charlie, didn't you see that boy between those cars" and the conductor says: "I didn't see him, didn't you?" Did you make any such statement?

A. I don't remember ever making any such statement.

Q. Would you have remembered it if you had made such statement?

A. Yes sir.

I did see the accident when it happened. I had a *dictor* five minutes after the accident and there was quite a crowd gathered when I got back with him. Found the doctor at the drug store not

67

over half a block away. After the accident we coupled up this car that Mr. Lee attempted to couple and did it all right. I looked at the bumper right after the accident and there was nothing the matter with it. There were seven or eight, or nine cars attached to the engine when it was backing up as well as I can remember. Had to leave three in that track as near as I can remember.

Cross-examination:

Have been in the employ of the Central Railroad, up to this time, will be twelve years in about three or four months. Was nearly ten years in the employ of the company at the time of this accident. I may have been running that day as extra conductor. I don't remember, because we catch a regular train and run on it for about four or five months, and then business falls off and we go on the extra. According to my testimony on the former trial I was running extra myself and that's the truth.

Q. That's one important thing that your memory has failed you on?

A. I don't know that it is so important.

I said I didn't know whether I was running extra or not. I guess my memory has failed me on that. Don't remember when
68 we left Tennille; left there on 42 schedule though; my record would show; no one told me to bring it. I know we got to Wadley in the early morning, along between 7 and 8 o'clock. Lee and I were riding in the caboose. It is the flagman's duty to throw the switches and Lee did that. Lee and I walked up the side of the train, he on one side and me on the other. That's a part of our duty. We generally had a larger train than forty cars, and we walked along the train for the purpose of seeing whether the seals were all right and sort of general inspection. Don't know whether we met at the road crossing, or at all. The engine and some cars had been cut off, so as to clear the road crossing, and had gone to the coal chute—the engineer, fireman and brakeman Walker. Don't remember getting any switching lists, but I wouldn't swear that I didn't. We have to find out whether there are cars on the Wadley yards to be picked up and brought to Savannah, and we have to go in the office to get that information. Don't remember whether I had two switching lists or not. If I did I signed them and they have a record, and can prove or disprove Lee's statement about it. Had three cars to leave
69 there and that's why Lee was to couple them to the coal car, which I instructed him to do. Told Lee to line up the switches and make that coupling. I didn't say anything about the brakeman. Think Lee is mistaken about that, but me telling him to line up the switches is correct. I was the conductor and in charge of the train and its crew. There was some switching to be done prior to going down and coupling to this coal car. The brakeman and myself were doing that, and Lee was setting the switches to No. 3 track. The engineer took signals from me and from Walker, I was standing about three or four car lengths from Lee when the accident happened. I didn't know of any trouble until he waved us down to stop and went in between the cars. Sometimes the bumper is closed up and you can't make a coupling without one bumper open. If one man can't see the engineer the signals are transferred from one to the other. The engine and cars stopped on the signal of Lee. The end car of the train, on which the engine was, was, approximately, ten feet from the coal car that was standing in No. 3 track.

Q. There is no doubt about it that Mr. Lee took the precaution to stop the train?

70 A. He did.

He did that before he went in between the cars. I saw him. No one had *to* right to move the train or signal the engineer until he came out. He had a right to feel perfectly secure in there while he was at work after the cars were standing still. The engineer had no right to move that train under those circumstances until Lee came out and gave him the signal, and if he did move without a signal then that caused this injury. I could not see what Lee was doing between the cars. Saw him go in between when the train stopped.

Q. I will ask you this question: Suppose you as conductor was standing along the side two or three car lengths away, and you had seen Mr. Lee signal the train to stop, he was not visible to the engineer, but you had seen him come out and knew he was safe, under those circumstances you would have a right to signal the engineer, if you knew he was safe?

A. I don't know whether he is ready to come back or not. I wouldn't know whether he was making the coupling. He was the man to give the signal and he was the only one.

Q. No one else had any right to give a signal?

71 A. Only to transfer his signal.

Q. What did you say on a previous trial of this case—read that where I have my finger?

A. Yes, that's right, after he came out I had a right to give a signal. I said transfer a signal when Mr. Lee got out. I didn't use that word though. My previous statement was to the effect that while Mr. Lee would be the only one that had a right to give a signal that I as conductor, if I saw he was in a place of safety, would have a perfect right to give a signal, and if the engineer saw it he would obey it. When Lee came out and signalled the engineer he was right near the car that was coupled to the engine, as well as I remember. Then he waved the engineer back, and as the cars came back he grabbed the grab irons and kicked at the bumper. He waited until they came together; he couldn't reach ten feet. He walked over. As he came out and gave his signal to come back, why he went over to the car to be coupled to.

Q. I am reading to you from page 20 of your testimony on the former trial:

"He actually walked up the track ten feet to the still car
72 and moved out in front so he could signal the engineer and signalled the engineer from the side of the still car—that is the one on No. 3 track, the one we were to couple to." Didn't you say that on the previous trial?

A. I don't remember whether I said that or not; if I used those exact words. You read it correctly and it must be so. Lee was where he could see engineer all the time, on that side of the car, and he walked to where he could make the coupling on No. 3 track. He walked to the still car. When he got through adjusting the knuckle he signalled them to come back. He walked out from the car next to the engine, the one he had been working on.

Q. You say he gave the signal from the car next to the engine?
A. I don't know which one he was nearest to. He walked out from between the cars and gave a signal to come back.

I was standing three or four car lengths away. Mr. Lee wasn't hardly between the cars any time. When he came out and signalled the engineer back he was standing right near the car that was to be coupled to. He had been working on the knuckle of the car
73 next to the engine. When he came out from between the cars he signalled the engineer back and stepped towards the car to be coupled to. He got to the still car while the train was moving or got there before it started moving. The cars moved after the engineer got his signal. There is a grab iron on every car, inside and outside, and this is required by law, and I saw Lee grab hold just as the cars were coming together and undertook to kick that bumper. Yes, he grabbed both grab irons about the same time, one was moving and the other was still. I first said knuckle, which is a part of the bumper, but he kicked at the bumper. I just happened to use the word "knuckle." Saw him kick his foot up in there towards the bumper or knuckle, or whatever you want to call it. I hollered to him "Hey" something to attract his attention, just as he was in the act of kicking. I didn't suppose he was going to do such a thing or I would have hollered to him before. It — against the rules of the company. Lee ought to have some experience; he had been at it long enough. If he had made up his mind to stick his feet in there
I don't think my hollering would have stopped him. I try
74 to do my work as quickly as I can and get over the road.

Q. If, for instance, some fellows loaf on you have — been known to cuss some?

A. Yes, I have cussed some, I wouldn't have a man that wouldn't hold up his end. We don't have to have them. I jack them up.

Don't think I am any harder on the men than any one else on the road. I don't cuss a man out for not making a coupling. This coupling didn't make. I examined the couplings after the accident occurred and didn't see anything wrong with them. The brakeman made the coupling afterward and the cars were pushed down in there. When this accident actually occurred I was standing about three or four car lengths from Mr. Lee up towards the engineer. Was then something like two car lengths from the engineer. Did not say anything to the engineer until after the accident. We hadn't finished our work until those cars were left. Lee had nothing to do with the work of separating the Wadley and Savannah cars. Walker and the engineer had done that under my supervision and I had gone over to finish this last job, when we were to pull out after the engineer got water. At that time I was in full view of the en-
75 gineer and as conductor I was boss of the train. After Le was hurt he fell out on the side and lay down. As near as I remember, he fell on his back; he may have faced the engine. After his foot was mashed I ran back for the doctor. Three or four of us ran up there at the same time. Don't know whether anybody "beat" me to it. I went up to see how he was hurt; saw his foot was mashed and went right on back for a physician. Couldn't say wh

was the first man to him; I was one of the first. Don't remember that I had any conversation with O'Donnell at that time. After the physician came I asked Mr. Lee, "didn't you hear me holler at you" and he said yes he did in the presence of Dr. Holmes, Mr. O'Donnell and the section foreman, Mr. Sasser. I think some negroes were there.

Redirect examination:

If Mr. Lee had been in a position where he could not have seen the engineer, I would have transferred his signal. On this occasion Mr. Lee gave the signal, as he was on the inside of the curve on the engineer's side. The engineer can see better on a curve on his side.

Recross-examination:

I said I would have had to give the engineer the signal if Mr. Lee couldn't see him. I also did say that I didn't remember whether I gave the signal or not, and that if I had given a signal I would have remembered. The brakeman was on the side, on the ladder of one of the cars, between the engineer and Lee, and I wasn't far from the engine.

Q. And if Lee was behind the cars, in between the cars, then he could not give a signal?

A. No.

Q. And if he was between the cars then you and Walker were the only men that could have given a signal?

A. Yes, sir.

R. D. SASSER, sworn on behalf of defendant, testified:

I am section foreman on the Central Railroad, and held that position when Mr. Lee was hurt in September, 1913. I was standing just a little back beyond the crossing, on the west side of the crossing. When Mr. Lee was about to make this coupling I was about six car lengths away from him. I was standing, as well as I remember, with my foot on the rail of warehouse track No. 2, which is next to the main line. My section gang was cleaning up around the yard. I saw Mr. Lee when the engine was coming back to make the coupling. He was standing giving signals to back up just before he gave the stop signal. Think *of* one of the brakeman, colored brakeman, was giving signals probably two car lengths from Lee. Lee waved the engineer down, waved a stop signal, and went in between the cars, and then he came out and waved him to come back; I saw him. Of course I couldn't tell exactly how close the cars were together from where I was standing, but Mr. Lee grabbed the grab iron of the coal car standing still and that of the other and threw his foot up like this (indicating). This was after he signalled the engineer to come back and just as the cars come together. I then ran to him as quick as I could. I looked at these couplings afterward and I didn't see a thing the matter with them. Couldn't say which one got to him first. Mr. Tarver, Mr. O'Donnell and myself ran up there about the same time.

Q. Mr. Lee says that, when the engineer was within five or six feet of the coal car that was on this track, he signalled him to stop and he did stop; that he went in there to adjust one of the couplers or bumpers on the car; that while he was there, and before he came out and gave any signal, the engineer slammed his engine
78 back without any signal and caught his foot between the two couplers—is that true?

A. No, sir. Mr. Lee waved him back himself. After coming out from between the cars and after fixing them. After we came up there Mr. O'Donnell said something like "what in the world did you do that for boy"—something like that. I wouldn't be positive that those were his words.

Q. Did you hear Mr. O'Donnell say to the conductor "Charley did you see him" and the conductor said "No, I didn't see him, did you see him"—did you hear any such conversation?

A. I wouldn't say positively that I did hear them, nor I didn't. I don't remember. I don't know that I would have remembered it. I was paying more attention to Mr. Lee. I sat down and held his head and shoulders in my lap until Dr. Holmes got to him.

Cross-examination:

I have nothing to do with the operation of the trains, nor the switching of the cars in the yard. That's not a part of my business. I was working a gang of six at that time—overseeing them, and was not looking for any trouble. There was nothing peculiar
79 about the way Mr. Tarver was handling his train, and Mr. O'Donnell was not handling the cars any different. I was standing six car lengths away in charge of a gang of negroes, attending to my business and these gentlemen were attending to theirs. I was right about opposite the engine. All right near the station. near the depot. Saw Mr. Tarver there in the yard before the accident; he was moving cars about in the yard. When they were making that switch they were all there together. I happened to be standing there and saw the accident when it happened. Could not say positively how close Mr. Tarver was to me. Just a little to the left side of me towards Lee; just a short distance. I had not said anything to the engineer that I know of. We are on good terms and there is no reason why I shouldn't have spoken to him if we were close enough together. Don't know that Mr. Tarver and I spoke. Saw Mr. Lee up about this coal car standing in No. 3 track; saw the engineer back slowly towards it; saw Mr. Lee signal him to stop before he went in between the cars, and the cars stopped five or six feet apart. I may have said ten feet apart at the last trial. Guess my memory was a little fresher than it is now. Couldn't tell exactly the distance they were apart from where I was.
80 Something like five or six feet or maybe a few feet farther. I had to guess at it. I did say before I thought it was about ten feet. Don't know what Mr. Tarver said about that. I did not measure the distance and the best I could tell it was five or six feet; I may have said ten feet. I said Lee was between the cars a minute

or fifty second- and came out and gave the signal and the engineer backed up to where the still car was.

Q. Standing up there with his hand on the grab iron of the car in No. 3 track, and then, as I gather it, while standing there waiting until the engine backed the other car up, and as soon as the other grab iron came within reach he grabbed that?

A. I think he did.

Then standing with one foot on the ground he undertook to kick something on the inside of the car. I wouldn't say that he had hold of both grab irons, but he had his hand on the coal car and threw his foot up between the cars and I think he caught the car coming to him. Think he had a hand on each grab iron. Don't think he undertook to kick until he had hold of the second grab iron.

81 Just before the cars coupled Mr. Lee walked to the other car that was standing, the coal car, and put his left hand on the coal car, catching the grab iron, and when this other car got close enough for him to reach it, he got it with his other hand and threw his right foot up to kick the coupling. That's the way it happened. After he was crushed the cars didn't couple at that time. Lee fell off to one side. I didn't pay any attention to any conversation between Tarver and Lee at that time. Something was said. I remember O'Donnell telling Lee "what in the world did he do that for." The statement I made before (reading) "I remember Mr. Tarver asking him what in the world was he doing, or something like that; I disremember the words that was said. I could not say positively what was said on that line" is correct as nigh as I can make one. Mr. Tarver and not Mr. O'Donnell made that statement according to that.

R. N. PORTER, sworn on behalf of defendant, testified:

I am employed as car inspector for the Central Railroad and was working in that capacity at Wadley when Mr. Lee was hurt. Did not see the accident. I came up a few minutes afterward and Mr. Lee was lying out between the tracks near the cars on No. 3 track. I made an inspection of the couplers on those two

82 cars and they were both in good condition; good working order. They were in condition to couple automatically by impact. The doctor had gotten to Mr. Lee when I got there. The lift levers on the cars worked all right. Don't know whether they coupled after the accident, as I wasn't there.

Cross-examination:

When I got there Mr. Lee had not been carried away. The cars were not coupled and were something like four or five feet apart, I tried the lift levers and there was no trouble about them at all; they did the work all right. Couldn't tell you whether the bumpers were in alignment. I was not inspecting them to couple the cars. I heard that they had tried to couple and wouldn't couple. If the bumbers don't meet they won't couple. This I couldn't tell when

they were that far apart. I have been there something over fifteen years. I estimated the distance between the cars to be four or five feet. Don't know whether you term me a mechanic or not. It is not my business to couple them but to inspect them. I didn't pay any attention as to whether they were in alignment—the bumpers.

Can't say that I was responsible if anything was wrong with
83 them; I am supposed to fix them, and to find out if they need it. All I had to do was to pull the lift lever on that coal car and up came the pin.

FRANK O'DONNELL, sworn on behalf of defendants, testified:

My name is Frank O'Donnell and I am engineer on the Central Railroad. Have been acting in that capacity for that road since the 3rd day of October, 1901. Was engineer on the train at the time Mr. Lee was injured at Wadley. I was going back from the main line after I left the coal chute to the track known as No. 3 at Wadley. There was about four or five cars coupled to the engine. I understood that those cars were to be coupled to a car in No. 3 track. There are three or four tracks on the line there and this coal car was setting in the clear on No. 3 track. Mr. Lee was giving me signals to come back to couple this car. As I approached the car he gave me a slow-up sign, which is know- to us men on engines, and immediately after doing so, as if he saw there was something wrong he waved me down before we attempted to couple those cars. I stopped the engine and the end of the rear car coupled to the engine

stopped at a distance, as well as I could see from where I was
84 on the engine, about ten feet from the still car. Mr. Lee went between the cars. I was watching continuously the point where Mr. Lee went in, as I always do on all occasions, and wait for that man to come back out when he gets through. I stopped and waited until Mr. Lee did come out from between the cars, and Mr. Lee, himself, gave me the signal to come back to couple up. I felt he had made the necessary repairs, whatever was necessary, and Mr. Lee came out from between the cars and waved me back, and I released the brake on the locomotive, applied steam and moved back slowly, which was only a distance of about ten feet (as near as I could see from where I was at). As the car that he was to couple to the coal car (the one that was standing) approached Mr. Lee he placed his hand on the eave of this car and raised his foot and as he raised his foot I heard conductor Tarver holler loud enough for me to hear him on the engine, which was an indication to Lee that he was doing wrong and also to me. I applied the brake, but as the cars were just in the act of coupling, although the engine stopped instantly, it could not prevent the accident that occurred to Mr. Lee, catching his foot in between the cars. The cars did not

couple. They moved off a few feet. I examined the couplers
85 afterward and there was nothing wrong with them that I know of. They did not couple at the time because Mr. Lee's shoe caught in the knuckle, slid over the draw-head in between the knuckles, and they could not couple. Nobody gave me a signal to

me back but Mr. Lee. I know because I was looking direct at r. Lee and waiting on his signal. I stopped on his signal and I ited for him to give me a signal before I could move. I was in a sition where I could see him. The engine was headed for Savanah and that puts me on the right hand side and this lead was going the left. I positively was in that position on that date.

Q. Mr. O'Donnell, Mr. Lee says (you have heard him testify) st, after the injury and while he was lying there on the ground, st you and Mr. Tarver, the conductor, ran up and each one asked e other if they had not seen him in between there and each one you said "No you hadn't seen him," is that true?

A. No sir, it is not. I positively did not make any such statement. is true, in point of fact, that I did see him go in between and come t and give the signal.

After Mr. Tarver saw Mr. Lee fall out from between the cars, he held up his hands just like this (indicating). I was getting off the engine and knew the man must have been hurt from the manner he fell out. I rushed up to him with the intenon of finding out and rendering some assistance, if possible. Mr. arver ran up also. When I got up there I said something to Mr. ee: "what did you do that for" or something like that, and that ou are not badly hurt." That was the first thing I said. Saw the eel of his shoe apparently mashed in. I was trying to keep up his ourage. I said to Mr. Tarver something about a doctor. Don't hink Mr. Tarver said anything at all until he came back with the octor. I had a few words with Dr. Holmes. It positively is not me that when Dr. Holmes came up he asked me and the conductor ow it happened and if we had eye-witnesses and that both of us knowledged that we did not see it. It is not true as Mr. Lee states at he signalled me to stop and I stopped within five or six feet of e car he was to couple to, and that he went in there to make some djustment of the coupler, as he couldn't do it with his hand, and e put his foot up to push the bumper over, and without any signal om him and before he came out, I slammed the cars back and caught his foot between the draw-heads. I am no enemy of Mr. Lee and deeply regret his injury. We have always been like any other flagman on the road.

At that time I made rate of speed to make the coupling. The me movement I always come back. The cars were in open view. e never hit them so hard, unless in case of a misleading signal a ng distance away. We came back at a slow rate of speed to couple . We coupled to the car after Mr. Lee was removed. It was made thout any difficulty and we pushed the cars in the clear on the ck and come on out and got our train.

Cross-examination:

I understood that a coupling had to be made and that three cars re to be left. Mr. Lee set the switch leading into No. 3 track. He ve me the signal to come back slowly for the coupling, and then, parently as if something was wrong, he gave me a stop signal and topped. Yes, I said the cars were distant apart about from here

(witness stand) to that railing over there; about that; that's jus
an estimate. I believe I said ten feet and that's the way it appear
to me now. My statement was ten feet; I don't know what the other
said. I felt that when Lee waved me down he thought there wa
something wrong and he wanted the train to stop so he could
88 go in and fix it. He was in between the cars probably a min
ute; long enough to do some usual adjustment, such as
would expect. Under the conditions existing I wouldn't have move
that train except on signal from Mr. Lee; would not have moved fo
the superintendent. If I did I would feel that I would be criminall
negligent. Mr. Lee came out from between the cars and was standing
at the end of the coal car that had been stationary in No. 3 track
with his hand on the iron rod. He signalled me to come back with
his right hand; his left was apparently up against the car. My im
pression is he had his left hand at or about the end of the car and
gave me a back-up signal. He stood in that attitude until I backed
the cars up. As the cars were about to couple Mr. Lee put out his
right hand to take hold of the end of the approaching car that was
to be coupled, and in that act he raised his foot. That's how the
accident happened. I couldn't say that he grabbed the grab iron
of the moving car but he put his hand against the end of the grab
iron. He had his hands on both cars when they got close enough to
couple, or in the act of coupling. Mr. Tarver was probably two car
lengths away in the direction of Lee. I have said and it is
89 correct that the conductor was standing right there close by
me. He was close by the engine in general charge of my
train, standing there for the purpose of giving me instructions what
to do, that was Mr. Tarver. That was the statement I made before
on the other trial. Mr. Tarver had some form of paper in his hand
I don't know what it was; couldn't possible say it was switch lists.
Don't remember when Mr. Sasser came up; whether it was a few
seconds afterwards or whether he got there about the same time we
did. I remember seeing him there. When Mr. Tarver came up he
made some remark but I can't say what it was as I don't remember.
If I knew what they were I would tell.

Dr. W. B. Holmes, sworn on behalf of defendants, testified:

I am a physician and have been practicing for twenty-one years.
I reside at Wadley, Georgia, and was living there in September,
1913. I had occasion to render aid to Mr. Lee, the plaintiff in this
case.

Q. On yesterday Mr. Lee, the plaintiff, testified to this statement
of facts. I read from the stenographer's transcript: "Q. What doc
tor did they bring? A. Dr. W. B. Holmes. Q. What did they do
with you? A. As soon as Dr. Holmes come up he says 'How did
this happen' and the engineer says 'I don't know.' He says
90 'I think he got under the wheel' and the conductor spoke up
'I think the wheel got him too.' He says 'there is no eye
witnesses: didn't anybody see it' and they both acknowledged that
neither of them saw the accident. Q. In the presence of Dr. Holmes

A. Yes sir." Doctor did any such conversation take place in your presence or was any such conversation addressed to you?
A. No, sir. That statement is not true.
When I got there I suppose there was ten or fifteen people there. He was lying on the ground. I asked how it happened and nobody replied just at the moment, and I asked the second time how this happened, and some one, I don't know who, either the engineer or conductor, said: "Why doctor this is the way it happened and pointed at the coupling, at the knuckles. There was a little piece of shoe leather and a little blood on it. This is the way this happened. That's the answer I got. I then proceeded to relieve Lee's suffering. Took him to my office and performed the operation on his leg. I was down here at the time this case was tried last February, but I didn't testify. I got a request to attend this trial yesterday afternoon. I left home this morning at 4 o'clock. Got a telegram from Mr. Owens, the chief surgeon, to come, I am under his jurisdiction.

No cross.

Mr. Johnson, of counsel for the defendants, announced that they had two negro members of the train crew sworn as witnesses, in the witness room; that neither of them saw the accident, but that they were here and he wished to account for them and tendered them to the plaintiff in the case and could be used by him if he desired.

We hereby agree to the foregoing as a correct brief of the evidence in the case of B. C. Lee vs. Central of Georgia Railway Company and Frank O'Donnell. Dec. 18, 1915.

OSBORNE & LAWRENCE,
Attys. for B. C. Lee.
LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attys. for Defts.

The foregoing is approved as a correct brief of the evidence in the case of B. C. Lee vs. Central of Georgia Ry. Co. and Frank O'Donnell. This December 18, 1915.

DAVIS FREEMAN,
Judge City Court of Savannah.

Brief of evidence (second trial) filed in office December 18, 1915.
THOMAS S. RUSSELL,
Deputy Clerk, C. C. S.

Order Granting New Trial.

I cannot, without instruction from a higher authority, improve on the charge to the jury in this case, and for this reason the motion is denied on all of the grounds (5th to 10th inclusive) based on the charge as given, and on the failure to charge. If the charge is

correct there is nothing in the 11th ground and the motion is denied on that ground. It is also denied on the first, third and fourth grounds.

This leaves for consideration the second ground of the motion. Involved in this is the question of the constitutionality of that portion of the 5th section of the act approved August 13th, 1915, entitled "An Act to alter, amend and revise the several laws relating to the city court of Savannah" which reads as follows: "No second new trial shall be granted in any case except for errors of law when there is no evidence to support the verdict."

Counsel for plaintiff made no argument when this motion was heard and submitted the plaintiff's case on the motion with the statement that defendants' contentions (which include this constitutional question) did not in his judgment call for a reply from him.

93 I think that the portion of the act referred to is unconstitutional and that I am at liberty to consider the second ground of the motion. I have given this question anxious consideration, both because it is a second motion for new trial and because of the fact coming within my own knowledge hereinafter mentioned.

The testimony as to the occurrence which is the basis of the suit was substantially the same on the second trial as on the first. It seems to me now as it did on the first trial, and on the consideration of the first motion, that the testimony greatly preponderates in favor of the defendants, and that plaintiff's testimony as to how he was hurt is improbable.

The chief difference in the records of the testimony on the two trials goes to the credibility of the plaintiff, and is the testimony adduced on the second trial from the witnesses, and particularly from the plaintiff and Dr. Holmes, as to certain alleged statements of the conductor or engineer in the presence of Dr. Holmes, and alleged answers by one or both of them to question by him.

The plaintiff testified also that he could not walk with his cork leg without crutches the day after the first trial. I saw him either

94 the day of the first trial after the case had gone to the jury, or the day after, on York Street, between Drayton and Abercorn walking on an artificial leg, with a stick, but without crutches. Frankness requires me to make this statement. This fact within my own knowledge necessarily influences my opinion as to his credibility. I cannot divest myself of this knowledge.

A new trial is granted on the second ground of the motion. February 14, 1916.

DAVIS FREEMAN,
Judge City Court of Savannah.

In the City Court of Savannah.

I, Thomas S. Russell, deputy clerk of the City Court of Savannah, do hereby certify that the within and foregoing constitutes a true transcript of such parts of the record in the case of B. C. Lee, plaintiff in error, vs. Central of Georgia Railway Company and Fran

O'Donnell, defendants in error, as are named in the bill of exceptions filed in the clerk's office of the City Court of Savannah February 16th, 1916.

And I do further certify that the January term of the City Court of Savannah commenced its session on January 3rd, 1916, and that the same is still in session as appears from the minutes of the said court.

95 In witness whereof I have hereunto set my official signature and affixed the seal of the City Court of Savannah, at Savannah, Georgia, this February 21st, 1916.

[SEAL.] THOMAS S. RUSSELL,
Deputy Clerk City Court of Savannah.

[Endorsed:] Case- No. 7296 and 7297. Court of Appeals of Georgia. March Term, 1916. Lee versus Central of Ga. Ry. Co. et al. and vice versa. Transcript of record. Filed in office Feb. 22, 1916. Logan Bleckley, C. C. A. Ga.

96 STATE OF GEORGIA,
County of Chatham:

Be it remembered that B. C. Lee filed in the city court of Savannah, June 22nd, 1914, an action for damages against Central of Georgia Railway Company and Frank O'Donnell, said petition being returnable to the July 1914 term of said court;

Be it further remembered that the said defendants duly filed their demurrers, general and special, to the said petition, which amendments to said demurrers *which* were allowed by the court, and all of which are of record and a part of the record in said case; and said demurrers coming on to be heard on September 21st, 1914, the court overruled all of the grounds of the said demurrers so filed by the defendants, and thereupon the said defendants presented their exceptions pendente lite to the judgments and orders overruling said demurrers, which exceptions were duly certified by the court on September 25th, 1914, and ordered filed as a part of the record in said case; and said exceptions pendente lite are of record and part of the record in said case;

Be it further remembered that afterwards and before the first trial of said case, to wit: on February 16th, 1915, the defendant,
97 Central of Georgia Railway, presented an amendment to its answer in said case (which was duly verified) containing additional paragraphs numbered 5, 6, 7, and 8, which said amendment to the answer the court on said date allowed as to paragraphs numbered 5 and 6 and disallowed as to paragraphs numbered 7 and 8; which said amendment to the answer of the defendant, Central of Georgia Railway Company is of record and a part of the record in said case; and thereupon said defendant, Central of Georgia Railway Company presented its exceptions pendente lite to the judg-

ment and order of the court disallowing the paragraphs numbered 7 and 8 of the amendment to its answer, which exceptions were duly certified by the court on February 18th, 1915, and ordered to be filed as a part of the record in said case, and said exceptions pendente lite are of record and a part of the record in said case;

And be it further remembered that afterwards, and before the second trial of said case, to wit, November 8th, 1915, the defendant, Frank O'Donnell, presented an amendment to his answer in said case (which was duly verified) containing additional paragraphs numbered 5, 6, 7, and 8, which said amendment to his answer the court on said date allowed as to paragraphs numbered 5 and 6 and disallowed as to paragraphs numbered 7 and 8; which said amend-

98 ment to the answer of defendant, Frank O'Donnell, is of record and part of the record in said case; and thereupon said defendant, Frank O'Donnell presented his exceptions pendente lite to the judgment and order of the court disallowing paragraphs numbered 7 and 8 to the amendment of his answer, which exceptions were duly certified by the court on November 11th, 1915, and ordered filed as a part of the record in said case and said exceptions pendente lite are of record and a part of the record in said case;

Be it further remembered that said case proceeded to a trial before a jury in said court on November 9th, 1915, and the jury returned the following verdict:

"We, the jury, find for the plaintiff in the sum of thirteen thousand, five hundred eighty-three ($13,583) dollars.

E. W. BARNWELL, *Foreman.*"

Whereupon the plaintiff on November 10th, 1915, entered up judgment against both defendants, Central of Georgia Railway Company and Frank O'Donnell, for said sum and for the costs of court;

Be it further remembered that the said defendants filed a motion for new trial in said case on November 11th, 1915, on which rule nisi was duly issued and served, and afterwards, to wit, on December

17th, 1915, filed an amendment to said motion for new trial

99 which was allowed by the court and the grounds thereof were approved as true and correct by the presiding judge, all of which appears of file and as part of the record in said case;

Be it further remembered that the court on February 14th, 1916, by an order of that date granted said motion for new trial on the second ground thereof, and thereupon the plaintiff sued out his bill of exceptions to this court to review the judgment of the court in granting the new trial in said case;

Be it further remembered that the court on February 14th, 1916, by said order of that date overruled and denied a new trial to the said defendants on the first, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh grounds of said motion and amended motion for new trial, to which order and judgment of the court refusing a new trial to the defendants on said grounds the defendants

then and there excepted and now except and assign the same as error, and say that the court committed error in not granting a new trial to the defendants on each and every of the said first, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh
100 grounds of their said motion and amended motion for new trial.

And the said defendants also now assign error upon their exceptions pendente lite hereinbefore recited and say that the court committed error as specified in said exceptions pendente lite in overruling the demurrers to the petition upon each and every ground thereof, and in disallowing amendments to the answers of the defendants to the petition in said case.

And the said defendants now specify as material and necessary to a proper understanding of the errors complained of the following portions of the record in said case (being in addition to those specified by the plaintiff in the main bill of exceptions), to wit:

1. The general and special demurrers of the defendant, Central of Georgia Railway Company to the petition in said case filed July 3rd, 1914, with the amendments thereto filed and allowed July 25th, 1914, and July 31st, 1914, respectively, together with the order of court overruling said demurrers dated September 21st, 1914.

2. The general and special demurrers of the defendant, Frank O'Donnell, to the petition in said case filed by consent of counsel and allowed by the court nunc pro tunc July 25th, 1914,
101 with the consent and order entered thereon allowing the same together with the amendment to said demurrer filed and allowed July 31st, 1914; and the order of court overruling said demurrers dated September 21st, 1914.

3. Exceptions pendente lite by the defendant, Central of Georgia Railway Company to the order overruling its demurrers certified September 25th, 1914, and filed October 1st, 1914.

4. Exceptions pendente lite by defendant Frank O'Donnell, to the orders overruling his demurrers, certified September 25th, 1914, and filed October 1st, 1914.

5. Exceptions pendente lite by the defendant, Central of Georgia Railway Company to the order disallowing the amendment to its answers, certified February 18th, 1915, and filed February 19th, 1915.

6. Exceptions pendente lite by the defendant, Frank O'Donnell, to the order disallowing the amendment to his answer, certified and filed November 11th, 1915.

7. The court's charge to the jury approved and ordered filed November 12th, 1915, and filed in clerk's office December 17th, 1915.

And now come the defendants, Central of Georgia Railway
102 Company and Frank O'Donnell, and present this their cross bill of exceptions and pray that the same may be signed and certified to be true and that the clerk of the City Court of Savannah be directed to transmit to the present October, 1915, term of the Court of Appeals of Georgia (along with the record specified in the main bill of exceptions) a true and correct transcript of such parts

of the record in said case as are herein specified, to the end that the errors herein complained of may be considered and corrected.

LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attorneys for Defendants in Error.

P. O. Address: Savannah, Georgia.

I do certify that the foregoing bill of exceptions is true and specifies all of the evidence and specifies all of the record material to a clear understanding of the errors complained of; and the clerk of the city court of Savannah is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the October 1915 term of the Court of Appeals of the State of Georgia, that the errors alleged to have been committed may be considered and corrected.

103 This February 16, 1916. DAVIS FREEMAN,
Judge City Court of Savannah.

Due and legal service of the within cross bill of exceptions and writ of error is hereby acknowledged, copy received; and all other and further service waived. This 16th day of February, 1916.

OSBORNE, LAWRENCE & ABRAHAMS,
Attorneys for Plaintiff in Error.

In the City Court of Savannah.

I, Thomas S. Russell, Deputy Clerk, City Court of Savannah, do hereby certify that the within and foregoing constitutes the true original cross bill of exceptions in the case of Central of Georgia Railway Company and Frank O'Donnell, plaintiff in error vs. B. C. Lee, defendant in error, filed in the clerk's office of the city court of Savannah, February 16th, 1916.

And I do further certify that the January term of the city court of Savannah commenced its session January 3rd, 1916, and that the same is still in session as appears from the minutes of the said court.

In witness whereof I have hereunto set my official signa-
104 ture and affixed the seal of the city court of Savannah, at Savannah, Georgia, this February 21, 1916.

[SEAL.] THOMAS S. RUSSELL,
Deputy Clerk City Court of Savannah.

Filed in office February 16, 1916.

THOMAS S. RUSSELL,
Deputy Clerk C. C. S.

[Endorsed:] Case No. 7297. Court of Appeals of Georgia. March Term 1916. Central of Ga. Ry. Co. et al., versus Lee. Cross Bill of Exceptions. Filed in office Feb. 22, 1916. Logan Bleckley, C. C. A. Ga.

105 In the City Court of Savannah, July Term, 1914.

B. C. Lee

vs.

Central of Georgia Railway Company et al.

And now comes defendant, Central of Georgia Railway Company, and demurs to the petition in the above stated cause on the following grounds:

1. Said petition does not set forth any good and valid cause of action against this defendant.

2. Said petition does not plainly, fully and distinctly set forth the plaintiff's cause of action against this defendant.

3. Because there is a misjoinder of parties defendant in said petition.

4. Because the city court of Savannah has no jurisdiction to hear or determine this case, the jurisdiction to hear and determine the same being vested exclusively in the superior court of Jefferson county, Georgia.

5. Defendant demurs specially to the allegations of the sixth paragraph of the first count of the petition because the same does not allege or show in what respect the couplings on the cars were not so maintained that they would couple automatically without the necessity of the plaintiff or other employes going in between the cars to couple them.

106 6. Defendant demurs specially to the eleventh paragraph of the first count of the petition because the same does not allege what officer, agent, or employe of this defendant knew that plaintiff was between the cars.

7. Defendant demurs specially to the thirteenth paragraph of the first count of the petition because the same does not specifically show or allege in what respects or particulars the company and the engineer were negligent.

8. Defendant demurs specially to the seventh paragraph of the second count of the petition because the same does not allege or show in what respect the couplings on the cars were not so maintained that they would couple automatically without the necessity of the plaintiff or other employe going in between the cars to couple them.

9. Defendant demurs specially to the allegations of the twelfth paragraph of the second count of the petition because the same does not allege what officer, agent, or employe of this defendant knew that plaintiff was between the cars.

10. Defendant demurs specially to the allegations of the fourteenth paragraph of the second count of the petition because the same does not allege or show specifically in what respects or
107 particulars the company and the engineer were negligent.

Wherefore, this defendant prays that these its grounds

of demurrer may be inquired of by the court and that it may be hence dismissed.

LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attorneys for Central of Georgia Railway.

General and special demurrer of Central of Georgia Railway Company, filed in office July 3, 1914.

WARING RUSSELL, Jr.,
Clerk C. C. S.

108 In the City Court of Savannah, July Term, 1914.

B. C. LEE

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY and FRANK O'DONNELL.

And now comes the defendant, Central of Georgia Railway Company, and with leave of the court amends its demurrers heretofore filed in said cause by adding the following:

11. Defendant demurs generally and specially to the first count of the petition because there is no authority to join as defendants this defendant railway company and one of its employes as an individual defendant in a suit under the Federal Employers' Liability Act.

Wherefore, defendant prays the judgment of the court and that it may be hence dismissed.

LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attorneys for Central of Georgia Railway Company.

Amendment allowed July 25th, 1914.

DAVIS FREEMAN,
Judge City Court of Savannah.

Amendment to demurrer of Central of Georgia Railway Company. Filed in office July 25th, 1914.

THOMAS S. RUSSELL,
Deputy Clerk C. C. S.

109 In the City Court of Savannah, July Term, 1914.

B. C. LEE

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY and FRANK O'DONNELL.

And now comes the defendant, Frank O'Donnell, and demurs to the petition in the above stated cause on the following grounds:

1. Said petition does not set forth any good and valid cause of action against this defendant.
2. The first count of the petition does not set forth any good and valid cause of action against this defendant.
3. The second count does not set forth any good and valid cause of action against this defendant.
4. Because there is a misjoinder of parties defendant in this petition.
5. Because the said petition is ambiguous and duplicitous in that it does not clearly appear whether the first count of the petition sets up a cause of action under the Federal Employers' Liability Act, or under the statutes of the State of Georgia.
6. Because the petition is ambiguous and duplicitous in that it does not clearly appear whether the second count of the petition sets up a cause of action under an Act of Congress or the statute of the State of Georgia.
7. Because if count 1 of the petition is based upon the Federal Employers' Liability Act, there is no authority under the law to join this defendant as a party defendant in an action against the railway company.

LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attorneys for Frank O'Donnell.

This demurrer filed nunc pro tunc by consent of counsel. This July 25th, 1914.

OSBORNE & LAWRENCE.
DAVIS FREEMAN,
Judge City Court of Savannah.

Demurrer of Frank O'Donnell, filed in office July 25th, 1914.
THOMAS S. RUSSELL,
Deputy Clerk City Court of Savannah.

111 In the City Court of Savannah, July Term, 1914.

B. C. LEE

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY and FRANK O'DONNELL.

And now comes the defendant, Central of Georgia Railway Company, at the first term, and with leave of the court amends its demurrers heretofore filed in said cause by adding the following grounds:

12. Defendant demurs specially to the first count of the petition because there is a misjoinder of causes of action in this, to wit: That the said plaintiff in said count sets up a cause of action against this defendant arising under the Act of Congress approved April

22nd, 1908, known as the Federal Employers' Liability Act, and in the same count the said plaintiff sets up a cause of action against the defendant Frank O'Donnell under the law of the State of Georgia.

Wherefore, defendant prays the judgment of the court and that it may be hence dismissed.

LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attorneys for Central of Ga. Ry. Co.

Amendment allowed July 31, 1914.

DAVIS FREEMAN,
Judge City Court of Savannah.

Amendment to demurrer of defendant, Central of Georgia Railway Company, filed in office July 31, 1914.

THOMAS S. RUSSELL,
Deputy Clerk C. C. S.

112 In the City Court of Savannah, July Term, 1914.

B. C. LEE

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY and FRANK O'DONNELL.

And now comes the defendant, Frank O'Donnell, at the first term, and with leave of the court amends his demurrers heretofore filed in said cause by adding the following ground:

8. Defendant demurs specially to the first count of the petition because there is a misjoinder of causes of action in this, to wit: That the said plaintiff in said count sets up a cause of action against this defendant under the law of the State of Georgia, and in the same count the plaintiff sets up a cause of action against the defendant, Central of Georgia Railway Company arising under the Act of Congress approved April 22nd, 1908, known as the Federal Employers' Liability Act.

Wherefore, defendant prays the judgment of the court and that he may be hence dismissed.

LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attorneys for Frank O'Donnell.

Amendment allowed July 31, 1914.

DAVIS FREEMAN,
Judge of the City Court of Savannah.

Amendment to demurrer of defendant, Frank O'Donnell, filed in office July 31, 1914.

THOMAS S. RUSSELL,
Deputy Clerk, C. C. S.

113 *Order on General and Special Demurrer of Central of Georgia Railway Company.*

All of the grounds of this demurrer as amended (being grounds 1 to 12 both inclusive) are overruled. September 21, 1914.

DAVIS FREEMAN,
Judge City Court of Savannah.

Order on Demurrer of Frank O'Donnell.

All of the grounds of this demurrer as amended (being grounds 1 to 8 both inclusive) are overruled. September 21, 1914.

DAVIS FREEMAN,
Judge City Court of Savannah.

114 In the City Court of Savannah, July Term, 1914.

B. C. LEE

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY et al.

Be it remembered that the defendant, Central of Georgia Railway Company, filed its general and special demurrers to the petition in the above stated cause and that said demurrers coming on to be heard, the court, on September 21, 1914, passed the following order overruling the same "All of the grounds of this demurrer, as amended, being grounds 1 to 12 both inclusive, are overruled," to which overruling of its demurrers the defendant excepts and prays that these, its exceptions pendente lite, may be certified to be true and made a part of the record.

LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attorneys for Central of Georgia Railway Co.

I hereby certify that the foregoing exceptions pendente lite are true and the same are ordered to be placed on the record. In Open Court September 15, 1914.

DAVIS FREEMAN,
Judge City Court of Savannah.

Exceptions pendente lite of defendant, Central of Georgia Railway Company, filed in office October 1, 1914.

WARING RUSSELL, JR.,
Clerk C. C. S.

115 In the City Court of Savannah, July Term, 1914.

B. C. LEE

vs.

FRANK O'DONNELL et al.

Be it remembered that the defendant, Frank O'Donnell, filed his general and special demurrers to the petition in the above stated cause and that said demurrers coming on to be heard, the court on September 21, 1914, passed the following order overruling the same: "All of the grounds of this demurrer, as amended (being grounds 1 to 8, both inclusive) are overruled," to which order overruling his demurrers the defendant excepts and prays that these his exceptions pendente lite, may be certified to be true and made a part of the record.

LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attorneys for Frank O'Donnell.

I hereby certify that the foregoing exceptions pendente lite are true and the same are ordered to be placed on the records. In Open Court, September 25, 1914.

DAVIS FREEMAN,
Judge City Court of Savannah.

Exceptions pendente lite of defendant, Frank O'Donnell, filed in office October 1, 1914.

WARING RUSSELL, JR.,
Clerk C. C. S.

116 In the City Court of Savannah, February Term, 1915.

B. C. LEE

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY et al.

Be it remembered that on February 16th, 1915, the defendant Central of Georgia Railway Company, before the trial of the above stated cause, tendered an amendment, duly verified, to its answer to the petition in said cause, said amended answer containing the following additional grounds of defense:

"5. The defendant admits the allegations of paragraph 5 of the first count of the petition and paragraphs 5 and 6 of the second count of the petition.

"6. Defendant strikes the word 'fifth' in paragraph 2 of its original answer, and the words 'fifth' 'sixth' in paragraph four of its original answer.

"7. Further answering the petition, defendant says that at the time of the injuries alleged to have been received by the plaintiff, as set forth in the first count of the petition, *as set forth in the first count of the petition,* this defendant was a common carrier by railroad, engaged in interstate commerce, and the said plaintiff was then and there employed by defendant in such commerce.

117 Defendant alleges that if any liability exists on its part to said plaintiff under the first count of the petition, such liability arises under and rests solely upon the Act of Congress of the United States approved April 22, 1908, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," known as the Federal Employers' Liability Act; and defendant says that to allow the joinder of this defendant, Central of Georgia Railway Company, with the defendant Frank O'Donnell as joint trespassers or joint tort feasors in a case arising under said Act of Congress, is unlawful and is a denial of the right and privilege of this defendant, Central of Georgia Railway Company, to have its liability to the plaintiff, if any exists, measured and determined solely and exclusively by the Federal Employers' Liability Act.

"8. For further answer defendant says: That to allow the plaintiff to join as defendants in one suit or action, this defendant, Central of Georgia Railway Company, and Frank O'Donnell, as joint trespassers under the laws of the State of Georgia, is, under the facts alleged in said first count, an interference with or regulation of interstate commerce by virtue of State statutes and is in violation of Arti-

118 cle 1, Section 8, of the Constitution of the United States, and of the Act of Congress approved April 22, 1908, passed in pursuance thereof, known as the Federal Employers' Liability Act."

Be it further remembered that on February 16th, 1915, the court disallowed and refused to permit the defendant to file the defenses set up in the 7th and 8th paragraphs of said amended answer in the following order:

"Amendment allowed as to paragraphs 5 and 6; disallowed as to paragraphs 7 and 8 because the defenses therein made were covered by the demurrers upon which the court has already ruled adversely to defendant.

DAVIS FREEMAN,
Judge City Court of Savannah."

Be it further remembered that the defendant, Central of Georgia Railway Company then and there excepted to the said order and ruling of the court disallowing the 7th and 8th grounds of its amendment to its answer and now excepts to the same.

Wherefore, the defendant prays that these its exceptions pendente lite may be certified to be true and entered upon the minutes and ordered filed as part of the record in said case.

LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attorneys for Central of Georgia Railway.

119 I do certify that the foregoing bill of exceptions pendente lite is true and the same is hereby ordered to be entered upon the minutes and filed as a part of the record in said cause. In Open Court this February 18th, 1915.

DAVIS FREEMAN,
Judge City Court of Savannah.

Exceptions pendente lite of Central of Georgia Railway Company to order of court disallowing amendment to its answer, filed in office February 19, 1915.

WARING RUSSELL, JR.,
Clerk C. C. S.

120 In the City Court of Savannah, November Term, 1915.

B. C. LEE

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY and FRANK O'DONNELL

Be it remembered that on November 8, 1915, the defendant, Frank O'Donnell, before the trial of the above stated cause, tendered an amendment, duly verified, to his answer to the petition in said cause, said amended answer containing the following additional grounds of defense:

"5. Defendant admits the allegations of paragraph 5 of the first count of the petition and of paragraphs 5 and 6 of the second count of the petition.

6. Defendant strikes the word "fifth" in paragraph 2 of his original answer, and the words "fifth" "sixth" in paragraph 4 of his original answer.

7. Further answering, this defendant says that at the time of the injuries alleged to have been received by the plaintiff as set forth in the first count of the petition, the Central of Georgia Railway Company, one of the defendants herein, was a common carrier by railroad and engaged in interstate commerce and the said plaintiff was then and there employed by defendant in such interstate commerce.

This defendant was likewise at that time employed by said
121 Railway Company in such interstate commerce. Defendant alleges that if any liability exists on the part of the defendant Central of Georgia Railway Company, to said plaintiff for said injuries, such liability arises under and rests solely upon the Act of Congress of the United States approved April 22, 1908, entitled 'An Act relating to the liability of common carriers by railroad to their employes in certain cases; and the amendments thereto,' known as the Federal Employers' Liability Act; and this defendant says that said plaintiff has no right of action against this defendant under said Federal Employers' Liability Act, and that there is no right or authority under said Act of Congress to join as defendants, *or authority under said Act of Congress to join as defendants,* or as joint tr

sers, or joint tort feasors, this defendant, and said Central of orgia Railway Company, in a case arising under said act, and de- dant says that to allow the joinder of this defendant with the ntral of Georgia Railway Company as joint defendants, or joint passers, in a case arising under said Act of Congress, is unlawful d is a denial of the immunity of this defendant from liability to plaintiff under the Federal Employers' Liability Act.

8. For further answer this defendant says that to allow plaintiff to join as defendants in one suit or action this defendant and the Central of Georgia Railway Company as joint passers, or joint tort feasors, under the law of Georgia, is, under facts alleged in the first count of the petition, an interference h or regulation of interstate commerce by virtue of the State utes, and is in violation of Article 1, Section 8, of the Constitu- n of the United States, and of the Act of Congress approved il 22, 1908, passed in pursuance thereof, known as the Federal ployers' Liability Act.

e it further remembered that on November 8, 1915, the court llowed and refused to permit the defendant to file the defenses set in the 7th and 8th paragraphs of said amended answer in the wing order:

Amendment allowed as to paragraphs 5 and 6; disallowed as to nd 8 because the defenses therein made were covered by the de- rers upon which the court has already ruled adversely to the fendants.

DAVIS FREEMAN,
Judge City Court of Savannah."

e it further remembered that the defendant, Frank O'Donnell, then and there excepted to the said order and ruling of the court disallowing the 7th and 8th grounds of the amendment to his answer and now excepts to the same.

Therefore, the defendant prays that these his exceptions pendente may be certified to be true and entered upon the minutes and ed filed as part of the record in said case.

LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attorneys for Central of Georgia Railway Company.

do certify that the foregoing bill of exceptions pendente lite is and the same is hereby ordered to be entered upon the minutes filed as a part of the record in said cause. In Open Court this ember 11, 1915.

DAVIS FREEMAN,
Judge City Court of Savannah.

ceptions pendente lite of Frank O'Donnell, to order of court ruling amendment to his answer, filed in office November 11, .

THOMAS S. RUSSELL,
Deputy Clerk C. C. S.

124 In the City Court of Savannah, November Term, 1915.

B. C. Lee

vs.

Central of Georgia Railway Company and Frank O'Donn

Charge of the Court.

Gentlemen of the Jury: This case is brought against the R road Company and Frank O'Donnell, its engineer. There are defendants, and, as originally stated, it contained two counts, alleging a cause of action under the Federal Employers' Liabi Act, and the other a cause of action under the State law, but, in of the admissions in the defendants' answers that they and the pl tiff were engaged in interstate commerce on the occasion in ques the plaintiff has abandoned the second count of his declaration you will pay no attention to it.

The petition states the plaintiff's contentions, after alleging jurisdictional facts, as follows: He says he was twenty-six years age on the 27th of September, 1913, and was employed by the fendant company as a flagman. His earnings, as such, were hundred dollars a month and upwards; that he was then well, st and in good health, and had the prospect of a long and

125 cessful career and of increased earning capacity. That that date, he, with engineer O'Donnell, conductor Cha Tarver, and Walker, a brakeman, composed the crew of the fre train No. 42, running from Tennille to Savannah, and that he, company, and each of its employes on said train were engaged interstate commerce. That when the train reached Wadley, while the crew were engaged in switching cars it became necessary make a coupling of the train to some coal cars standing in N track; that the coupling on the cars were not so maintained that would couple automatically without the necessity of plaintiff other employe going in between the cars to couple them, and that draw-head on the car attached to the train would not match the on the coal car standing on No. 3 track. He says that the conduc whose orders he was bound to obey, ordered him to couple the c and that he, Lee, signalled the engineer to stop and that the engi did stop the train when its rear car was within five feet of the car. That he, Lee, then went and opened the knuckle on the that was backing up; that he tried to shove the draw-head on car at the rear of the train so that it would match with the dr head on the coal car, but he could not do so with his han

126 He says that he then took hold of a grab-iron on the car placed his right foot on the draw-head of the car that had be backed up, and, just as he caught his foot on the side of the dra head, the engineer slammed the cars back and that the car str his body and his right foot slid around the end of the draw-head a was caught and so badly mashed that it had to be amputated.

s that his leg was so badly shattered that the physicians were ob-
ed to perform three operations upon it, and that it is now ampu-
ed about half way between the knee and ankle. He claims he is
manently injured; that his earning capacity is destroyed at least
enty-five per cent.; that he suffered, still suffers and will always
fer great pain, both mental and physical; that he had to stay in
hospital off and on for eight months; that the end of his leg, at
time of filing his suit, was a painful running sore, and that he
been unable to do any work since his injury and will not be able
work at all for many months to come. These are the allegations
his petition. He says that both the company and the engineer
ew he was between the cars. He says that the engineer knew he
s between the cars making a coupling and that the engineer
knew that the coupling was defective as he says it was, and
he also alleges that, by the exercise of ordinary care, the
engineer could have known that the coupling was defective
he says it was. He says that, under the custom and operating
es of the company, which, he says, were well known to the engi-
r and each of the employes of the company on the train, the
gineer had no right to move the car without a signal from the
intiff, but, he says, they were negligent in all of the particulars
out by him in his petition, and he further says that he was
thout fault; that there was no other way for him to couple the
s; that it was perfectly safe for him to endeavor to force the draw-
d with his foot while the car was standing still; that no person —
e train; or connected with the train, had a right to move the car or
give any signal for the moving of the car except himself, and that
had no reason to expect that the car would be moved except on
nal from him, and, finally, he claims that he has been damaged
the sum of forty thousand dollars.

Defendants, by their answers, admit the jurisdictional facts, and
e allegations as to who composed the train crew, the number of the
in, the point from which and to which it was running, and as
to the company and the train crew all being engaged in
s interstate commerce. They deny all of the other allegations
in the petition; that means all of the allegations, not only as
his injury and the extent of his injury, but his allegations as to
s freedom from fault and his allegations as to the particulars in
hich he says the defendants were negligent. The defendants thus
t the plaintiff on proof of the allegations denied. The pleadings
te the case you are trying. I have summarized them for your
nefit and without any intention on my part to express or intimate
opinion as to who is right on the facts. So far as you are con-
rned, I have no opinion on that point.

You are to ascertain from the evidence, under the instructions of
e court, who should prevail in the case, and your decision is to be
ntrolled by the preponderance of the evidence. By preponderance
the evidence is meant that superior weight of the evidence upon
e issues involved, which, while not enough to wholly free the mind
om a reasonable doubt, is yet sufficient to incline a reasonable and
partial mind to one side of the issue rather than to the other. In

determining where the preponderance of evidence lies, the jury ma
consider all the facts and circumstances of the case, the wi
129 nesses' manner of testifying, their intelligence, the mea
and opportunity for knowing the facts to which they testifie
and the probability or improbability of their testimony, their inte
est or want of interest, and also their personal credibility, as far
the same may legitimately appear from the trial. The jury ma
also consider the number of witnesses, though the preponderance
not necessarily with the greater number. You will observe, gentl
men, that preponderance means weight, greater weight, and, if y
find that the scales balance, hang even, level, on this question of te
timony as to who is right and who is wrong, there can be no reco
ery for the plaintiff. It is only when the pan of the scale in whi
his testimony rests or rather the testimony in his favor tilts the oth
that he is entitled to a verdict. There is no presumption of negli
gence against either of the defendants and the burden is upon th
plaintiff to show that he was injured and that his injuries we
caused by reason of one or the other of the alleged negligent acts
omissions named in his petition in this case against the railroad co
pany concurring with one or the other of the alleged negligent a
or omissions named in his petition against O'Donnell. The pr
sumption, which, in the State of Georgia, in a case against
130 railroad company, brought under the State law, would ari
against a railroad company upon proof of injury to an em
ployé and freedom from fault by him, does not arise in this ca
and the burden is upon the plaintiff to prove his case as to both d
fendants without the aid of any presumption. The case as again
the company is based on what is known as the Federal Employe
Liability Act, which is an Act of Congress, and which provides th
every common carrier by railroad, while engaged in commerce b
tween any of the several States, shall be liable in damages to an
person suffering injury while he is employed by such carrier in su
commerce for such injury resulting, in whole or in part, from th
negligence of any of the officers, agents, or employes of such carrie
or by reason of any defect or insufficiency due to its negligence i
its care. It is also provided that in all actions brought against an
such common carrier by railroad under or by virtue of the provisio
of this act, to recover damages for personal injuries to an employ
the fact that the employe may have been guilty of contributor
negligence shall not bar a recovery, but the damages shall be dimi
ished by the jury in proportion to the amount of negligence attrib
table to such employe. But there is this further proviso in the law
It is that no such employe who may be injured shall be he
131 to have been guilty of contributory negligence, nor shal
such employe be held to have assumed the risk of his em
ployment in any case where the violation by such common carrier
of any statute enacted for the safety of employes contributed to the
injury of such employe. The Congress enacted a law known as the
"Safety Appliance Act," which makes it the absolute duty of rail
roads to provide and keep proper couplers coupling automatically by
impact without the necessity for a person going between cars to un

couple them. So, under the law, you will observe that if the injury of the employe is contributed to by the violation of this Safety Appliance Act *of* the company is not entitled to a diminution of damages, or to the defense of assumption of risk. The defendant, O'Donnell, however, may urge the defenses of contributory negligence and assumption of risk.

The plaintiff says that the defendants are liable to him because he contends there was a coupler here which did not meet the requirements of this Safety Appliance law, and that this alleged violation of the law contributed to his injury, and because, he says, the engineer knew he was between the cars and knew, or negligently failed to know, the coupling was defective, and that, notwithstanding this, the engineer slammed the cars back without a signal from
132 him, thus contributing to the injury.

On the other hand, the defendants claim the coupling was not defective as alleged, that the engineer did not know Lee was between the cars, that, as a matter of fact, he was not between the cars when the engineer moved his train back; that the engineer moved his train back in a proper manner on a signal from Lee, and that Lee's injuries are due solely to his own negligence in attempting to kick the draw-head over in such circumstances, and that he could have avoided injury by the exercise of ordinary care on his part. You are to decide who is right, under the evidence, as to these contentions. Ordinary care, to which I have referred and to which I may refer hereafter, is defined as that care which every prudent man would use under the same circumstances.

Now, if you find from the evidence that the cars would not, at the time of this occurrence, couple automatically without the nece sity of plaintiff going in between the cars, then I charge you that the defendant, Central Railroad Company, was guilty of negligence as a matter of law and could not claim diminution of damages for any contributing negligence on Lee's part, if any, or plead assumption of risk, and would be without any defense to the case, and the plaintiff would have a right to recover the entire damages sus-
133 tained for any injuries proximately caused by that negligence, if you also find that O'Donnell was negligent and that this negligence concurred with the Company's in causing the casualty, unless Lee could have avoided injury by the exercise of ordinary care, as the statute prohibits the moving of any car by an interstate carrier which will not couple automatically by impact without the necessity of going between the cars. But I charge you there would not be any violation of the Safety Appliance Act if you find from the evidence that the cars, which the plaintiff was endeavoring to couple, were equipped with couplers, coupling automatically by impact, and which could be uncoupled without the necessity of men going between the ends of the cars. Now, if these injuries were not proximately caused by such a condition, that is to say by defective coupling apparatus, it could not be considered as a ground of liability on the part of the company. So, also, if the cars in question were equipped with couplers coupling automatically by impact, which could be uncoupled without the necessity of men going between the

cars, the provisions of the Safety Appliance Act would not be applicable to the case. I have spoke of proximate cause. Proximate cause has been defined as that which, by a natural and continuous sequence, unbroken by any new cause, produces an event and without which the event would not have occurred. Negligence to be the proximate cause of any injury, must be such that a person of ordinary caution or prudence would have foreseen that some injury would likely result therefrom not that the specific injury would result. To be the proximate cause, the injury must be the natural and probable consequence of the negligence; such an occurrence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from the act. Whether or not negligence is the proximate cause of an injury depends upon the circumstances in evidence and is usually to be determined by the jury.

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I charge you, however, that, if you believe from the evidence that the cars would not couple automatically and that the plaintiff went in between the cars while the train was stopped to fix or adjust them, and if you believe that he did adjust them and then came out from between the cars and signalled the engineer to come back, the condition of the couplers before he went in and adjusted them would not be the proximate cause of the injury.

If you believe from the evidence that the cars attached to the engine were moved back upon the plaintiff's signal for the purpose of making a coupling with stationary cars, and that just as the cars were about to come in contact in response to his signal he placed his foot against the drawbar of one of the cars and was injured solely by reason of that action on his part, and without any negligence on the part of defendant, then he cannot recover and your verdict should be for the defendants.

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In the event you find that there was nothing the matter with the coupling apparatus and that the cars would couple automatically by impact, but that the company was otherwise negligent as charged in the petition, through its servant, O'Donnell, the engineer, then the defendant company may make the defense contributory negligence to the extent that if you find that the plaintiff was guilty of negligence, but that he could not have avoided injury by the exercise of ordinary care, then this negligence would not bar a recovery for the plaintiff, but he still would be entitled to recover, the damages being diminished by the amount of negligence attributable to him. Of course, if neither the defendant company nor its engineer was guilty of any negligence at all, or if they were both guilty of negligence, but this negligence did not concur in causing his injuries, then the plaintiff could not recover, whether he himself was negligent or whether he was not negligent.

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So, if you find that the plaintiff was himself negligent, either in regard to the time, place, or manner in which he undertook to shove or adjust the draw-bar, and that his negligence was the proximate cause of his injury, and that no negligence of the company or O'Donnell concurred to contribute to the casualty, then I charge you

that he is not entitled to damages and you should find in favor of the defendants.

If you find in this case that neither of the defendants were negligent as charged in the declaration, or that only the company was negligent and O'Donnell was not, your verdict would be for them, because, under the law, this casualty having happened in another county, this court has no jurisdiction of the case against the company unless O'Donnell, who is charged with concurring negligence, was negligent in one of the ways charged against him, and this negligence concurred with the negligence of the company. If you find they were negligent in any particulars charged in the declaration, and that their respective negligence concurred, but that
137 such negligence was not the proximate cause of plaintiff's injuries, such concurring negligence could not be considered as a basis for liability. If plaintiff's injuries were not due to any concurrent negligence of the defendants as charged in the declaration, but were due to his, plaintiff's own want of care for his own safety, your verdict would be for the defendants.

If you find his injuries were not received while between his cars, and were not occasioned by the engineer's slamming the cars back, knowing he was there, without a signal from him, and if you find that he had come out from between the cars, and had signalled the engineer to come back, and if you find the engineer came back properly in obedience to a signal from him, and if you further find that, after such signal, and while the cars were coming back, he attempted to kick the draw-head over, and that he was injured under these circumstances and without any negligence on the part of defendants, he could not recover and your verdict would be for the defendants.

As between the plaintiff and the engineer, both were bound to use ordinary care, which has been defined to you. If they were both negligent, but the engineer's negligence was greater than
138 Lee's, and if Lee could not have avoided injury by the exercise of ordinary care, then plaintiff could recover, but the amount of the recovery would be diminished in proportion to Lee's negligence. If he was equally negligent with, or more negligent than the engineer, he could recover nothing against the engineer.

If you find from the evidence that, under the custom and practices of the company, no employe had a right to move the train except upon a signal from the plaintiff, and that the engineer knew, or, by the exercise of ordinary care, should have known this custom, and that plaintiff was between the cars, and the engineer knew it, or should have known it, and that, notwithstanding this, he slammed the cars without a signal from the plaintiff, and that a man in the exercise of ordinary care would not have done so, and that plaintiff could not have avoided injury by the exercise of ordinary care, the plaintiff would be entitled to recover against both defendants.

If you find from the evidence that the engineer knew that plaintiff was between the cars, and knew, or by the exercise of ordinary care, could have known that the coupling apparatus was defective, and that, with such knowledge, he slammed the cars backward

while plaintiff was between the cars, and that such conduct
139 was not consistent with ordinary care, and that plaintiff could not have avoided injury by the exercise of ordinary care, you would be authorized to find a verdict against both defendants.

You will observe that, in this case, the company and the engineer are sued as joint tort feasors, wrong doers, and in order for the plaintiff to recover against the railroad company he must also recover against the engineer in the case. That is to say, it must be because you find the engineer was negligent in one of the ways charged against him, and this negligence concurred with negligence charged against the defendant company. To state it the other way around, if you should find that the engineer is not liable in the case, you will also find that the company is not liable. That is because this court has no jurisdiction if the company alone was negligent. Only in the event you should find that the company was negligent and also that O'Donnell was negligent, and that the negligence of the two concurred in causing the injury complained of can there be a recovery. There must be either a verdict against both defendants, or in favor of both. If you find that the defendants are not liable, your verdict would be, "We, the jury, find for the defend-
140 ants," and, in that event, there would be no further work for you to do. If you find that the defendants are liable, then you are to determine in what amount they are liable. There are two classes of damages claimed here: One is damages for alleged pain and suffering, physical and mental, and the other is for alleged lost capacity to earn a livelihood. The first, pain and suffering, is not capable of mathematical measurement. A jury determine from the evidence how much a man has suffered and how much and how long he will suffer in the future, if at all. Then they determine, in the light of that evidence weighed by their enlightened consciences as upright and impartial men, what would properly compensate him for that suffering, and, at the same time, be fair to the defendants.

As to the other element of damages claimed, if you find the defendants liable, and should believe from the evidence that plaintiff was capable of earning so much per year, and because of the injury and wrong inflicted upon him by the defendants, his earning capacity has been destroyed or materially reduced, and that this destruction of, or decreased capacity will continue through life, you will ascertain from the evidence the age of the plaintiff at the time
141 the injuries were inflicted, and then ascertain how long he would probably live in the ordinary course of nature beyond his age at the date the injuries were inflicted. You will then ascertain from the evidence what would have been his yearly earnings during his life expectancy but for the injury. In arriving at this you will give due weight to the contingencies developed by the evidence, or common to human experience, which might increase or diminish his earning capacity and his earnings. Then you will determine from the evidence the annual loss, if any, which has been occasioned by reason of his injuries. In considering these questions you will bear in mind that it rarely happens that a man labors every day until his death, or receives all the while a fixed or regular in-

come from his labor, nor does his capacity to earn money often remain undiminished to old age. Feebleness of health, actual sickness, loss of employment, voluntarily abstaining from work, dullness in business, reduction in wages, the increasing infirmities of age, with a corresponding diminution in earning capacity, and other causes may contribute in greater or less degree, to decreasing the gross earnings of a lifetime. In estimating damages a proper allowance and deduction should be made in favor of the defendants for
142 any diminution of income from labor, which would probably result from any of these sources. You should also take into consideration and give proper weight to any evidence before you, if there be such, tending to show a reasonable prospect of increased earnings on the part of the plaintiff. Having ascertained from the evidence the annual loss, if any, which has been occasioned by reason of his injuries, you can multiply the amount so ascertained by the number of years in the expectancy of life and the result would be the gross amount of the loss he will sustain during his life expectancy. This sum must be reduced to its present cash value, because, in earning it, it would come to him in installments during the period of his life, whereas the amount you find, if any, in favor of the plaintiff will be paid in a lump sum presently, and would, necessarily be less than the gross amount of the loss; and this cash value may be arrived at by dividing this gross amount by one dollar, plus interest on one dollar at seven per cent. for the term of plaintiff's expectancy of life. A table, known as the Annuity Table, has been introduced in evidence. You are not bound to use it. It may be used to assist you in determining the amount, if any, the plaintiff is entitled to recover, if his injury is permanent. You may use it, if you see
143 fit, and it is my duty to instruct you as to the manner of its use. It may be used in ascertaining the present value of the gross sum you find the plaintiff will have lost by reason of his injury. Thus, having ascertained from the evidence the age of the plaintiff at the time of his injury, you will look in the column of this table headed "Age" until you find the figures representing the age of the plaintiff, and opposite these figures, in the column marked seven per cent., on the same line and to the right of the column headed "Age," you will find the figures representing the cash value of one dollar paid annually through the expectancy of life of an average person of the age of the plaintiff at the time of his injury. Having ascertained from the evidence the average yearly loss of earnings of the plaintiff, you may multiply this sum by the figures so found in the seven per cent. column, and the result will be the present cash value you are seeking, if the plaintiff was an average man. Of course, if you do not use the table, these instructions as to the method of its use, will be disregarded by you.

If you find for the plaintiff, having ascertained the total amount of damages to which he is entitled, your verdict will be: "We,
144 the jury, find for the plaintiff" such an amount, stating it.

If, on the other hand you find for the defendants, you will disregard everything I have said with reference to the measure of damages and the method of ascertaining the amount of damages,

and your verdict will be: "We, the jury, find for the defendants." When you have arrived at your verdict, it will be signed and dated by your foreman and will be entered on that one of the papers which has no cover on it, the white paper. You may retire.

Approved and ordered filed as a part of the record. This Nov. 12, 1915.

DAVIS FREEMAN,
Judge City Court of Savannah.

Charge of the court, filed in office December 17, 1915.
THOMAS S. RUSSELL,
Deputy Clerk C. C. S.

In the City Court of Savannah.

I, Thomas S. Russell, Deputy Clerk of the city court of Savannah, do hereby certify that the within and foregoing constitutes a true transcript of such parts of the record in the case of Central
145 of Georgia Railway Company and Frank O'Donnell, plaintiffs in error, vs. B. C. Lee, defendant in error, as are named in the cross bill of exceptions filed in the clerk's office of the city court of Savannah, February 16th, 1916.

And I do further certify that the January term of the city court of Savannah commenced its session January 3rd, 1916, and that the same is still in session as appears from the minutes of the said court.

In witness whereof I have hereunto set my official signature and affixed the seal of the city court of Savannah, at Savannah, Georgia, this February 21st, 1916.

[SEAL.] THOMAS S. RUSSELL,
Deputy Clerk City Court of Savannah.

[Endorsed:] Case No. 7297. Court of Appeals of Georgia. March Term 1916. Central of Ga. Ry. Co. et al. versus Lee. Transcript of Record. Filed in office Feb. 22, 1916. Logan Bleckley, C. C. A. Ga.

146 Court of Appeals of the State of Georgia.

7296 and 7297.

B. C. LEE

v.

CENTRAL OF GEORGIA RY. CO. et al. and Vice Versa.

The Court of Appeals desires instruction from the Supreme Court upon the following questions involved in this case:

1. In a case tried in the city court of Savannah a second new trial was granted the same party upon the sole ground that the evidence strongly preponderated in his favor, and in the order granting the new trial the judge of that court declared unconstitutional so much

of the act approved August 13, 1915, relating to the city court of Savannah (Acts 1915, p. 123, section 5), as provides: "No second new trial shall be granted in any case except for errors of law, or where there is no evidence to support the verdict." This ruling was made upon oral argument only of counsel for the movant, there being no pleadings in which the constitutionality of the act in question was attacked. The losing party excepts to the grant of the second new trial. Conceding that the evidence supports the verdict and that no error of law appears, has the Court of Appeals jurisdiction to hear and determine this case, or does it "involve the con-
147 struction of the constitution of the State," or is it a case "in which the constitutionality of any law of the State of Georgia * * * is drawn in question," in contemplation of the amendment to the constitution, ratified November 7, 1916, relating to the jurisdiction of the Supreme Court?

2. May an employe of a railway company engaged in interstate commerce maintain a joint action against the company and its engineer, under the Federal "employers' liability act" of 1908, where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury to the plaintiff, and where also a violation of the "safety appliance act" of Congress is charged against the carrier?

The clerk of the Court of Appeals is hereby directed to prepare and transmit to the Supreme Court a certified copy of the foregoing questions, together with the record in this case.

148 Supreme Court of Georgia.

Atlanta, November 17, 1917.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

B. C. Lee

v.

Central of Georgia Ry. Co. et al. and Vice Versa.

This case came before this court upon questions certified by the Court of Appeals; upon consideration whereof it is ordered that the case be returned to that court with the instructions contained in the opinion this day filed. All the Justices concur, except Fish, C. J., absent on account of sickness, and Atkinson, J., disqualified.

Supreme Court of the State of Georgia.

Clerk's Office.

Atlanta, Dec. 21, 1917.

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

[SEAL.] Z. D. HARRISON, *Clerk.*

149 Supreme Court.

185.

LEE

v.

CENTRAL OF GEORGIA RY. CO. et al.

The Court of Appeals certified the following questions:

"1. In a case tried in the city court of Savannah a second new trial was granted the same party upon the sole ground that the evidence strongly preponderated in his favor, and in the order granting the new trial the judge of that court declared unconstitutional so much of the act approved August 13, 1915, relating to the city court of Savannah (Acts 1915, p. 123, section 5), as provides: 'No second new trial shall be granted in any case except for errors of law, or where there is no evidence to support the verdict.' This ruling was made upon oral argument only of counsel for the movant, there being no pleadings in which the constitutionality of act in question was attacked. The losing party excepts to the grant of the second new trial. Conceding that the evidence supports the verdict and that no error of law appears, has the Court of Appeals jurisdiction to hear and determine this case, or does it 'involve the construction of the constitution of the State,' or is it a case 'in which the constitutionality of any law of the State of Georgia * * * is drawn in question,' in contemplation of the amendment
150 to the constitution, ratified November 7, 1916, relating to the jurisdiction of the Supreme Court?"

"2. May an employe of a railway company engaged in interstate commerce maintain a joint action against the company and its engineer, under the Federal 'employers' liability act' of 1908, where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury to the plaintiff, and where also a violation of the 'safety appliance act' of Congress is charged against the carrier?"

GILBERT, *J.:*

1. The Court of Appeals has jurisdiction to hear and determine this case. It does not "involve the construction of the constitution of the State," nor is it a case in which the constitutionality of any law of the State of Georgia * * * is drawn in question," in contemplation of the amendment to the constitution, ratified November 7, 1916, relating to the jurisdiction of the Supreme Court.

The record of the case, together with the query propounded by the Court of Appeals, shows that the trial judge in rendering

the judgment granting a new trial declared a part of a statute of the General Assembly "unconstitutional" without indicating whether it offended against the State or the Federal constitution, and without pointing out what portion of either constitution it offended. The question propounded assumes that the ruling has reference to the constitution of Georgia. Even with this qualification the ruling is not sufficiently specific to afford a review of the same. A reviewing court can not ascertain what section or paragraph of the constitution the trial judge had in mind; and it is an unvarying rule that this court will not search through and consider the entire constitution, State or Federal, to determine whether the act offends in some particular, where none is specified. Griggs v. State, 130 Ga. 16; Anderson v. State, 2 Ga. App. 1. The judgment, therefore, in this case should be treated without reference to the constitutionality of the act, since this has not been drawn in question.

2. The second question is answered in the negative. An employe of a railway company engaged in interstate commerce can not maintain a joint action against the company and its engineer under the "Federal Employer's liability act" of 1908, where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury to the plaintiff. And this is true irrespective of any allegation as to a violation of the "safety-appliance act" of Congress.

The Federal employer's liability act imposes a duty upon the carrier, and this law is exclusive. All State laws which were applicable to such a case prior to the above enactment are suspended. Landrum v. W. & A. R. Co., 146 Ga. 88; N. Y. Central R. Co. v. Winfield, 37 S. C. 546.

This law, however, does not apply to the engineer. It is statutory, and its applicability is limited by its own terms to interstate common carriers. "As only common carriers are liable under the act, an individual or a corporation not a common carrier can not be made a joint defendant. Nor can an employe of a defendant railroad company be joined with it as a defendant." Richey Fed. Em. L. Act (2d ed.), §128, and authorities cited. See also Taylor v. Southern Ry. Co., 178 Fed. 380. In the case of Western & Atlantic R. Co. v. Smith, 144 Ga. 737, this court decided that in a suit under the State law an employe of a railroad company could not join as defendants, in the same action, the employer company and another railroad company not sustaining the relation of employer. In such a case the rules of law applicable to the several defendants are not the same. To join defendants in one suit they must owe the same duty. 38 Cyc. 483. Where there is no joint duty there can be no joinder. 29 Cyc. 565, and note 71. In a suit where the laws of this State are applicable to both the engineer and the carrier, they may be jointly sued for an injury caused by concurring negligence of the two. Southern Ry. Co. v. Grizzle, 124 Ga. 735.

A conclusion contrary to the one stated above, even if it could be reconciled with the Federal statute, would lead to confusion and in-

justice. Under our Civil Code, §4513, "if judgment is entered jointly against several trespassers and is paid off by one, the others shall be liable to him for contribution." If the carrier and its engineer were jointly liable under the conditions stated in the second question a joint judgment would result against them, and they would be equally bound, regardless of the fact that the duties imposed upon them are not the same. The jury would have no power in such a case to specify the particular damages to be recovered of each, since Civil Code §4512 is not applicable to personal torts. McCalla v. Shaw 72 Ga. 458; Cox v. Strickland, 120 Ga. 104.

154 All the Justices concur, except Fish, C. J., absent, and Atkinson, J., disqualified.

Supreme Court of Georgia.

Clerk's Office.

Atlanta, Dec. 21, 1917.

I hereby certify that the foregoing pages hereto attached contain a true and complete copy of the opinion of the Supreme Court of Georgia in the case therein stated, as appears from the original on file in this office.

Witness my signature and the seal of said court hereto affixed the day and year above written.

[SEAL.] Z. D. HARRISON, *Clerk.*

[Endorsed:] Cases Nos. 7296, 7297. Court of Appeals of Georgia. March Term, 1916. Lee versus Central of Ga. Ry. Co. and vice versa. Instructions of Supreme Court. Transcript of Record. Filed in office Dec. 21, 1917. W. E. Talley, D. C. C. A. Ga.

155 Court of Appeals of Georgia.

7296, 7297.

LEE

v.

CENTRAL OF GEORGIA RAILWAY COMPANY et al. and Vice Versa.

By THE COURT:

1. It being held by the Supreme Court that "an employe of a railway company engaged in interstate commerce can not maintain a joint action against the company and its engineer under the 'Federal employer's liability act' of 1908, where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury to the plaintiff," and that "this is true irrespective of any allegation as to a violation of the

safety-appliance act' of Congress," the trial judge erred in overruling those portions of the defendants' demurrers which set up a misjoinder of parties defendant and a misjoinder of causes of action. For the same reason the court erred in disallowing paragraphs 7 and 8 of the amendments of the defendants to their answers, setting up a misjoinder of parties defendant and a misjoinder of causes of action.

2. Under the ruling of the Supreme Court as stated in the preceding headnote, a new trial necessarily results, and it is not
156 necessary to consider the exceptions in the main bill of exceptions to the second grant of a new trial by the trial judge. All other exceptions in the crossbill of exceptions, except those arising on the questions of misjoinder of parties defendant and misjoinder of causes of action, not being discussed in the brief, will be treated as abandoned.

HARWELL, *J*: Lee brought suit against the Central of Georgia Railway Company and O'Donnell, its engineer, for personal injuries alleged to have been sustained by him while coupling cars. The petition originally contained two counts, the first count being based upon the Federal "employer's liability act," and the second count upon the Georgia statute, the first count alleging that the injury occurred while the plaintiff was employed in interstate commerce, and the other alleging that it occurred while he was employed in intrastate commerce. It was also alleged in each count that the railway company was guilty of a violation of the "safety-appliance act" of Congress in respect to the coupling apparatus. The defendants admitted in their amended answers that the plaintiff was
157 injured while employed by the railway company in interstate commerce. Thereupon the plaintiff expressly abandoned the second count of the petition and the case proceeded to trial solely upon the first count, which was founded upon the Federal "employer's liability act." The first verdict and judgment in favor of the plaintiff was set aside by the court, and a new trial granted. A second verdict against both defendants jointly, upon which a joint judgment was rendered against them, was likewise set aside and a new trial granted upon the defendants' motion. The trial judge, in his order upon the second motion for new trial, said: "This leaves for consideration the second ground of the motion. Involved in this is the question of the constitutionality of that portion of the 5th section of the act approved August 13, 1915, entitled "An act to alter, amend, and revise the several laws relating to the city court of Savannah," which reads as follows: 'No second new trial shall be granted in any case except for errors of law where there is no evidence to support the verdict.' * * * I think that the portion of the act referred to is unconstitutional, and that I am at liberty to consider the second ground of the motion." The court thereupon granted a new trial upon the second ground of the motion, which was based upon — ground that the verdict is decidedly and strongly against the weight of the evidence. The
158 plaintiff excepts to this second grant of a new trial. The defendants filed demurrers upon the ground that there was a misjoinder of parties defendant, and upon the further ground that there

the employer company and another railroad company not sustaining the relation of employer. In such a case the rules of law applicable to the several defendants are not the same. To join defendants in one suit they must owe the same duty. 38 Cyc. 483. Where there is no joint duty there can be no joinder. 29 Cyc. 565, note 71. In a suit where the laws of this State are applicable to both the engineer and the carrier, they may be jointly sued for an injury caused by concurring negligence of the two. Southern Ry. Co. v. Grizzle, 138 Ga. 735, 53 S. E. 244, 110 Am. St. R. 191.

"A conclusion contrary to the one stated above, even if it could be reconciled with the Federal statute, would lead to confusion and injustice. Under our Civil Code, §4513, 'if judgment is entered jointly against several trespassers and is paid off by one, the others shall be liable to him for contribution.' If the carrier and its engineer were jointly liable under the conditions stated in the second question, a joint judgment would result against them
164 and they would be equally bound, regardless of the fact that the duties imposed upon them are not the same. The jury would have no power in such a case to specify the particular damages to be recovered of each, since Civil Code §4512 is not applicable to personal torts. McCalla v. Shaw, 72 Ga. 458; Cox v. Strickland, 120 Ga. 104, 47 S. E. 912, 1 Ann. Cas. 870."

Main bill of exceptions dismissed. Judgment on cross bill reversed. Broyles, P. J., and Bloodworth, J., concur.

165 Court of Appeals of the State of Georgia.

7296.

Atlanta, January 21, 1918.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

B. C. LEE

v.

CENTRAL OF GEORGIA RY. CO. et al.

This case came before this court upon a writ of error from the city court of Savannah; and, after argument had, it is considered and adjudged that the main bill of exceptions be dismissed. Broyles, Bloodworth and Harwell, JJ., concur.

Bill of Costs, $10.00.

166 Court of Appeals of the State of Georgia.

7297.

Atlanta, January 21, 1918.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

CENTRAL OF GEORGIA RY. CO. et al.

v.

B. C. LEE.

This case came before this court upon a writ of error from the city court of Savannah; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the court erred in overruling the defendants' demurrers setting up a misjoinder of parties defendant and a misjoinder of causes of action and in disallowing the portions of defendants' amendments to their pleas setting up a misjoinder of parties defendant and a misjoinder of causes of action. Broyles, Bloodworth and Harwell, JJ., concur.

Bill of Costs, $10.00.

167 STATE OF GEORGIA,
Chatham County:

Be it remembered that at the January 1918 term of the City Court of Savannah, his Honor Davis Freeman, judge of said court presiding, there came on to be heard the case of B. C. Lee against the Central of Georgia Railway Company and Frank O'Donnell, and that upon the hearing of the said case the court passed an order sustaining the demurrers of each of the defendants to the petition for misjoinder of defendants and misjoinder of actions, and passed an order providing that paragraphs seven and eight of the amendments to their said answers filed by each of the defendants to the petition in said case, be allowed. The judgment of the court further provided that the petition should stand dismissed on demurrer unless the plaintiff shall on or before February 19th, 1918, amend the petition so as to avoid the misjoinder of parties defendant and the misjoinder of causes of action.

Be it further remembered that the plaintiff in said case has filed no amendment since the judgment of said court which is dated February 9th, 1918.

Be it further remembered that the plaintiff then and there
168 excepted to the judgment of the court sustaining the demurrers of the defendants to the petition for the misjoinder of parties defendant and for misjoinder of causes of action, and now excepts to the same and assigns error upon the same and says that the court should have overruled said demurrers and erred in refusing so to do.

Be it further remembered that the plaintiff then and there excepted to the judgment of the court allowing the seventh and eighth paragraphs of the amendments to the answers filed by each of the defendants and now excepts to the same and assigns error upon the same and says that the court should have refused to allow said amendments and erred in refusing so to do.

Be it further remembered that the plaintiff then and there ex-

cepted to the judgment of the court ordering the petition to be dismissed unless the plaintiff shall on or before February 19th, 1918 amend the petition so as to avoid the misjoinder of parties defendant and the misjoinder of causes of action, and now excepts to the same and says that the court should have refused to dismiss said petition and erred in failing so to do.

Be it further remembered that said judgment of the court is a final judgment and finally disposes of said cause.

169 Plaintiff specifies as material and necessary to a proper understanding of the errors complained of the following parts of the record:

1. Plaintiff's petition omitting the second count abandoned by plaintiff.

2. The amendment to the petition filed July 25th, 1914, together with the order allowing the same.

3. The answer of the Central of Georgia Railway Co.

4. The answer of Frank O'Donnell.

5. The amended answer of Frank O'Donnell, with the order allowing same.

6. The amended answer of the Central of Georgia Railway Company together with the orders allowing the said amendments.

7. The demurrer of Frank O'Donnell and demurrer of C. of Ga. Ry.

8. The amendment to the demurrer of the defendant Frank O'Donnell, together with the order allowing the same.

9. The amendments to the demurrers of the Central of Georgia Railway Company allowed July 25th and July 31st, 1914, together with the order allowing the same.

170 10. The final order and judgment of the court of February 9th, 1918, together with the remittiturs from the Court of Appeals of the State of Georgia attached thereto.

And now comes the plaintiff within the time allowed by law and presents this his bill of exceptions and prays that the same may be certified to be true and that the clerk of the city court of Savannah be directed to transmit to the Court of Appeals of the State of Georgia, a true and correct transcript of such parts of the record as are herein specified to be material and necessary to a proper understanding of the errors complained of to the end that the same may be considered and corrected.

OSBORNE, LAWRENCE & ABRAHAMS,
Attys. for Plaintiff in Error.

STATE OF GEORGIA,
Chatham County:

I do certify that the foregoing bill of exceptions is true, and contains all of the evidence and specifies all of the record material to a clear understanding of the errors complained of; and the clerk of the city court of Savannah is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill

171 of exceptions specified, and certify the same as such, and cause the same to be transmitted to the present term of the Court of Appeals of the State of Georgia, that the errors alleged to have been committed may be considered and corrected. This February 25, 1918.

DAVIS FREEMAN,
Judge City Court Savh.

In the City Court of Savannah

I, Thomas S. Russell, Deputy Clerk of the City Court of Savannah, do hereby certify that the within and foregoing constitutes the true original bill of exceptions in the case of B. C. Lee, plaintiff in error, vs. Central of Georgia Railway Company and Frank O'Donnell, defendants in error, filed in the clerk's office of the city court of Savannah, February 27th, 1918.

I do further certify that the January 1918 term of the city court of Savannah commenced its session on January 7th, 1918, and that the same is still in session as appears from the minutes of the said court.

In witness whereof I have hereunto set my official signature and affixed the seal of the City Court of Savannah, at Savannah, Georgia, this March 2nd, 1918.

172 [SEAL.] THOMAS S. RUSSELL,
Deputy Clerk, City Court of Savannah.

Tendered February 21, 1918.

DAVIS FREEMAN,
Judge C. C. Savh.

Filed in office February 27, 1918.

THOMAS RUSSELL,
Deputy Clerk, C. C. S.

Due and legal service of the within bill of exceptions and writ of error acknowledged. All other and further service waived. Feb. 26th, 1918.

LAWTON & CUNNINGHAM,
H. W. JOHNSON,
Attys. for Defts. in Error, Savannah, Ga.

[Endorsed:] Case No. 9598. Court of Appeals of Georgia. March Term, 1918. Lee versus Central of Georgia Ry. Co. et al. Bill of Exceptions. Filed in office Mar. 7, 1918. W. E. Talley, D. C. C. A. Ga.

173 Court of Appeals of the State of Georgia.

Atlanta, Ga., January 21, 1918.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

CENTRAL OF GEORGIA RY. CO. et al.

v.

B. C. LEE.

This case came before this court upon a writ of error from the City Court of Savannah; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the court erred in overruling the defendant's demurrers setting up a misjoinder of parties defendant and a misjoinder of causes of action and in disallowing the portions of defendants' amendments to their pleas setting up a misjoinder of parties defendant and a misjoinder of causes of action. Broyles, Bloodworth and Harwell, JJ., concur.

Bill of Costs: $10.

Court of Appeals of the State of Georgia.

Clerk's Office.

Atlanta, Feb. 6, 1918.

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia, and that Lawton & Cunningham paid the above bill of costs.

174 Witness my signature and the seal of said court hereto affixed the day and year last above written.

[Seal of Court of Appeals of the State of Georgia.]

—— ——, *Clerk.*

175 Court of Appeals of the State of Georgia.

Atlanta, January 21, 1918.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

B. C. LEE

v.

CENTRAL OF GEORGIA RY. CO. et al.

This case came before this court upon a writ of error from the city court of Savannah; and, after argument had, it is considered and adjudged that the main bill of exceptions be dismissed. Broyles, Bloodworth and Harwell, JJ., concur.

Bill of Costs: $10.

Court of Appeals of the State of Georgia.

Clerk's Office.

Atlanta, Feb. 6, 1918.

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia, and that A. A. Lawrence paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

[Seal of Court of Appeals of the State of Georgia.]

LOGAN BLECKLEY, *Clerk.*

176 In the City Court of Savannah, January Term, 1918.

B. C. LEE

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY and FRANK O'DONNELL.

It appearing to the court by the within remittatur in the above stated cause *and* that the judgment of this court overruling the defendant's demurrers to the petition for misjoinder of parties defendant and for misjoinder of causes of action; and disallowing paragraphs 7 and 8 of the amendments to the defendants' answers to the petition, has been reversed by the Court of Appeals of Georgia; It is now considered, ordered and adjudged that the judgment of the Court of Appeals be and it is hereby made the judgment of this court in said case; that the demurrers of each of the defendants to the petition for misjoinder of parties defendant and for misjoinder of causes of action, be and they are hereby sustained; and that paragraphs 7 and 8 of the amendments to their answers filed by each of the defendants to the petition in said case be and they are hereby allowed.

It is further ordered and adjudged that the petition shall stand dismissed on demurrer unless the plaintiff shall on or before February 19th, 1918, amend the petition so as to avoid the mis-
177 joinder of parties defendant and the misjoinder of causes of action;

It is further ordered and adjudged that the defendants, Central of Georgia Railway Company and Frank O'Donnell, do have and recover judgment against the plaintiff, B. C. Lee, in the sum of twenty-five dollars and seventy-seven ($25.77) cents for the costs of court heretofore paid by them in this case.

In Open Court this February 9th, 1918.

DAVIS FREEMAN,
Judge City Court of Savannah.

Order and judgment on the remittitur, filed in office February 9, 1918.

THOMAS S. RUSSELL,
Deputy Clerk C. C. S.

178 Court of Appeals of Georgia.

9598.

LEE

v.

CENTRAL OF GEORGIA RAILWAY CO. et al.

By THE COURT:

LUKE, *J.*: The judgment of the trial court being in exact accordance with the decision in this case when it was formerly here for adjudication (Lee v. Central of Georgia Ry. Co., 21 Ga. App. 558, 94 S. E. 888), the questions presented by the present bill of exceptions are res adjudicata. The judgment must therefore be affirmed. Wade, C. J., and Jenkins, J., concur.

179 Court of Appeals of the State of Georgia.

Atlanta, April 12, 1918.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

B. C. LEE

v.

CENTRAL OF GEORGIA RY. CO.

This case came before this court upon a writ of error from the city court of Savannah; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. Wade, Jenkins and Luke, JJ., concur.

Bill of Costs, $10.00.

180 Savannah, Ga., April 13, 1918.

In the Court of Appeals of the State of Georgia, March Term, 1918.

No. 9598.

B. C. LEE, Plaintiff in Error,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY et al., Defendants in Error.

Logan Bleckley, Esq., Clerk Court of Appeals of the State of Georgia, Atlanta, Georgia.

DEAR SIR: You are hereby notified that plaintiff in error in the above named case, intends within the term prescribed by the rules of the Supreme Court to apply to the Supreme Court for a writ of certiorari in the above named case.

This notice being made in compliance with Rule 1 of the certiorari rules adopted by the Supreme Court on December 18th, 1916.

Respectfully,

B. C. LEE,

By OSBORNE, LAWRENCE & ABRAHAMS,

His Attorneys at Law.

Case No. 9598.

Court of Appeals of Georgia.

Filed in office April 15, 1918.

LOGAN BLECKLEY,

C. C. A. Ga.

181 Supreme Court of Georgia.

Atlanta, May 6, 1918.

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

B. C. LEE

v.

CENTRAL OF GEORGIA RY. CO. et al.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. Atkinson, J., disqualified.

Supreme Court of the State of Georgia.

Clerk's Office.

Atlanta, May 6, 1918.

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

[SEAL.] Z. D. HARRISON, *Clerk.*

Case No. 9598.
Court of Appeals of Georgia.
Filed in office May 6, 1918.

LOGAN BLECKLEY,
C. C. A. Ga.

182 In the Court of Appeals of Georgia, March Term, 1918.

Nos. 7296, 7297, 9598.

B. C. LEE, Plaintiff in Error,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY et al., Defendants in Error.

Præcipe.

Logan Bleckley, Esq., Clerk Court of Appeals of the State of Georgia, Atlanta, Georgia.

DEAR SIR: For use upon a petition for certiorari to the Supreme Court of the United States, please prepare for us a copy of the record in the above named case as follows:

7296-7297.

The main bill of exceptions, cross bill of exceptions, transcript on the main and cross bill of exceptions.

Questions certified to the Supreme Court. Answer with the opinion of the Supreme Court thereon.

Opinions and judgments of the Court of Appeals.

9598.

The bill of Exceptions. From the transcript of the record the two remittiturs and the judgment of the trial Court entered thereon. The opinion and judgment of the Court of Appeals.

Notice of plaintiff in error of his intention to apply to the Supreme Court of Georgia for writ of certiorari.

Judgment of the Supreme Court of Georgia on the petition for certiorari.

Very respectfully,

OSBORNE, LAWRENCE & ABRAHAMS.

Due and legal service of the foregoing Præcipe acknowledged this 7th day of May 1918.

T. M. CUNNINGHAM, JR.,
H. W. JOHNSON,
Att'ys for Defendants in Error.

183 Court of Appeals of the State of Georgia.

Clerk's Office.

Atlanta, May 11, 1918.

I hereby certify that the foregoing pages hereto attached contain true copies of all those portions of the record in the cases of B. C. Lee v. Central of Georgia Railway Co. et al., and vice versa, specified in the præcipe of counsel (which is also attached), as appears from the records and files of this office.

Witness my signature and the seal of said court hereto affixed, the day and year above written.

[Seal Court of Appeals of the State of Georgia, 1906.]

LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Georgia, Greeting:

Being informed that there is now pending before you a suit in which B. C. Lee is plaintiff in errror, and Central of Georgia Railway Company et al. are defendants in error, which suit was removed into the said Court of Appeals by virtue of a writ of error to the City Court of Savannah, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirty-first day of October, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Case Nos. 7296, 7297, 9598. Court of Appeals of Georgia. Filed in office November 5, 1918. Logan Bleckley, Clerk, Court of Appeals of Georgia.

[Endorsed:] File No. 26,614. Supreme Court of the United States, No. 528, October Term, 1918. B. C. Lee vs. Central of Georgia Railway Company et al. Writ of Certiorari.

B. C. LEE, Plaintiff in Error,

v.

CENTRAL OF GEORGIA RAILWAY CO. et al., Defendants in Error.

Writ of Error to the City Court of Savannah.

It is hereby stipulated by and between counsel for the respective parties in the above entitled cause that the record filed in the Supreme Court of the United States on the petition for certiorari which was granted, shall constitute the return to the said writ of certiorari which has been served upon the clerk of the Court of Appeals of the State of Georgia.

WM. W. OSBORNE,
A. A. LAWRENCE,
Attorneys for B. C. Lee.
T. M. CUNNINGHAM, JR.,
H. W. JOHNSON,
Attorneys for Central of Ga. Ry. Co. et al.

Case Nos. 7296, 7297, 9598. Court of Appeals of Georgia. Filed in office November 5, 1918. Logan Bleckley, Clerk, Court of Appeals of Georgia.

Court of Appeals of the State of Georgia.

CLERK'S OFFICE, ATLANTA, November 14, 1918.

In obedience to the writ of certiorari hereto attached and returned herewith, I hereby certify that the foregoing contains a true copy of the stipulation of counsel in the case therein stated, as appears from the original now of file in this office.

Witness my signature and the seal of said court hereto affixed, the day and year above written.

[Seal Court of Appeals of the State of Georgia, 1906.]

LOGAN BLECKLEY,
Clerk, Court of Appeals of Georgia.

[Endorsed:] File No. 26,614. Supreme Court U. S. October Term, 1918. Term No. 528. B. C. Lee, Petitioner, vs. Central of Georgia Railway Company et al. Writ of certiorari and return. Filed November 16, 1918.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 528150

B. C. LEE, PETITIONER,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY
ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA,

and

BRIEF IN SUPPORT OF PETITION.

WILLIAM W. OSBORNE,
ALEXANDER A. LAWRENCE,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No.

B. C. LEE, PETITIONER,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY AND FRANK O'DONNELL, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

To the Honorable the Supreme Court of the United States and the several Justices thereof:

The petition of B. C. Lee shows as follows:

Petitioner, while employed by respondent, Central of Georgia Railway Company, and engaged in interstate commerce, was injured by the concurrent negligence of the two respondents against whom he brought his action in the city court of Savannah, Georgia.

His complaint showed upon its face that petitioner and

his employer were engaged in interstate commerce (p. 3 of record).

To this complaint respondent interposed demurrers upon the ground that there is no authority to join as defendants the railway company and one of its employees as an individual defendant under the Federal Liability Act (pp. 44, 45, 46 of record).

The same defense was sought to be set up by plea (pp. 9-11 of record).

The trial court overruled the demurrer and struck the plea (pp. 10, 12, 47 of record).

The case having been carried to the Court of Appeals of Georgia by writ of error, it, under instructions from the Supreme Court of Georgia, reversed the trial court, holding that because of the fact that petitioner and the railway company were engaged in interstate commerce there was a misjoinder of parties and a misjoinder of actions (p. 64 of record).

After final judgment of the trial court dismissing the case and of the judgment of the court of appeals affirming this judgment, and of the Supreme Court of Georgia denying a petition for certiorari (pp. 73, 74, and 75 of the record), petitioner now comes and prays for a writ of certiorari and says it should be granted for the following reasons:

1st. The decision is one of far-reaching importance. In basing its conclusion upon the following premise (p. 63 of record):

> "The Federal Employers' Liability Act imposes a duty upon the carrier, and this law is exclusive. All State laws which were applicable to such a case prior to the above enactment are suspended. This law, however, does not apply to the engineer. It is statutory and its applicability is limited by its own terms to interstate common carriers. As only common carriers are liable under the act, an individual or a corporation not a common carrier cannot be made a joint defendant. Nor can an employee of the defendant railroad company be joined with it as a defendant".

the court in effect held that the Federal Liability Act is so far exclusive as to suspend all other laws, giving an employee a right of action against other than his employer. It in effect holds that the Federal act destroys the common-law liability of other persons than the carrier for torts to an interstate employee.

2d. The decision of the Georgia court is of far-reaching effect in that it deprives the interstate employees of the right which all courts, including the courts of Georgia, accord to other litigants of joining as defendants in one action all tort feasors whose concurrent negligence have injured him.

A striking illustration of this inconsistency and injustice is found in the present record. The complaint is in two counts. The first is based upon the Federal act (p. 3 of record). The second is based upon the State liability act (p. 5 of record). No complaint of misjoinder was made or adjudicated as to the second count, so that if petitioner had been injured while engaged in intrastate commerce he might, without challenge, have maintained his action against both respondents.

3d. A certiorari should be granted because the decisions of the courts of various States are in conflict. The appellate courts of Georgia and the appellate courts of Minnesota are in unreconcilable conflict:

The Supreme Court of Georgia epitomizes its ruling as follows:

"An employee of a railway company engaged in interstate commerce cannot maintain a joint action against the company and its engineer under the Federal Employers' Liability Act of 1908 where concurring negligence

The Supreme Court of Minnesota in Doyle *vs.* St. P. Co. *et al.*, 159 N. W., 1081; 134 Minn., 461, epitomizes its finding as follows:

"A complaint against two defendants alleging that their concurrent negligence caused an injury to the plaintiff is good against a demurrer for misjoinder of causes, though the liability of one defendant rests upon

of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury to the plaintiff. And this is true irrespective of any allegation as to a violation of the safety appliance act of Congress."

the Federal Employers' Liability Act and that of the other upon the common law."

The practice of the Georgia courts with reference to persons other than interstate employees is epitomized in the opinion of the Court of Appeals of Georgia in Sou. Ry. *vs.* Miller, 1 Ga. App., 621, affirmed by this court in Sou. Ry. *vs.* Miller, 217 U. S., 209, and followed by the Supreme Court of Georgia in L. & N. R. R. *vs.* Roberts, 130 Ga., 271, as follows:

> "The proposition that the declaration contained a misjoinder of defendants because the liability of the railway company is statutory, and that of the other defendants is common-law liability, we do not think is meritorious. We do not think it makes any difference whether the liability of one defendant arises from statute and the other from common law. The practical question to be decided is, is there a liability, and are the defendants all liable? And the particular source from which the liability of each defendant emanates cannot be material. The court's judgment is based on the liability of the defendant, whether statutory or common law, either one or both."

Because he was an interstate employee the courts of Georgia have refused to accord to petitioner the privilege they accord to other persons, and because of the far-reaching, as well as onerous effect of this decision, and the fact that this question has not heretofore been presented to this court, we submit this petition should be granted and the errors of the court below corrected.

WILLIAM W. OSBORNE,
ALEXANDER A. LAWRENCE,
Attorneys for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1917.

No. ——

B. C. LEE, *Petitioner,*

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY ET AL., *Respondents.*

On Petition for Certiorari.

Brief and Argument of Counsel in Support of the Petition.

Statement of the Case.

Petitioner, while employed as a flagman and engaged in interstate commerce, was injured by the concurrent negligence of respondents. He brought a joint action against the master carrier and the servant engineer. His complaint was in two counts. In the first (see p. 3 of the record) it was alleged that he and the carrier were engaged in interstate service. This allegation was omitted from the second count (see p. 5 of the record). To this complaint defendants demurred upon the ground that there was in the first count a misjoinder of parties and actions (see demurrer of O'Donnell, pp. 44-45-46 of the record, and amendment to the demurrer of the company, p. 64 of the record, and amendment to demurrer of O'Donnell, p. 46 of the record), the same question was raised by answer. (See amendments to the answer of respondents, pp. 9-11 of the record). The trial court overruled the demurrers and struck the pleas. The case proceeded to trial and a verdict was returned for the plaintiff. A new trial was granted and the second trial re-

sulted in a verdict for petitioner. This was again set aside by the trial judge, and petitioner carried the case to the Court of Appeals by writ of error. That court certified two questions to the Supreme Court of Georgia (see p. 60 of the record). The first involved the question as to the constitutionality of a statute prohibiting the grant of a second new trial except for errors of law.

The second question was as follows:

> "May an employe of a railway company engaged in interstate commerce maintain a joint action against the company and its engineer, under the Federal Employers' Liability Act of 1908 (U. S. Comp. St. 1916, 8657-8665), where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury by the plaintiff, and where also a violation of the safety appliance act of Congress (section 8605 *et seq.*) is charged against the carrier?"

To the first question propounded the Supreme Court answered that the record presented no question involving the constitutionality of the statute in question (see p. 62 of the record).

To the second inquiry the court answered:

> "An employe of a railway company engaged in interstate commerce cannot maintain a joint action against the company and its engineer under the Federal Employers' Liability Act of 1908, where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury to the plaintiff. And this is true irrespective of any allegation as to a violation of the Safety Appliance Act of Congress." (See p. 63 of the record).

The Court of Appeals in response to these questions reversed the trial court (see p. 64 of the record), and thereafter the trial court entered final judgment dismissing the cause. (See p. 73 of the record.) To this judgment of the

trial court petitioner sued out a writ of error to the Court of Appeals, which affirmed the judgment of the lower court (see p. 74 of the record.) Petitioner then applied to the Supreme Court of Georgia for a certiorari under the provisions of the Georgia constitution, which as amended (see p. 19, Georgia Laws 1916), provided as follows:

> "It shall also be competent for the Supreme Court to require by certiorari or otherwise any cause to be certified to the Supreme Court from the Court of Appeals for review and determination with the same power and authority as if the case had been carried by writ of error to the Supreme Court."

This petition was denied (see p. 75 of the record).

The case now having the finality requisite under the case of Bruse, Administrator, *vs.* William Tobin, 245 U. S., p. 18, and the Court of Appeals being the highest court of the State to which an appeal lay within the contemplation of the statute as construed in Sullivan *vs.* Texas, 207 U. S., 416, petitioner has petitioned for a certiorari to the end that the error of the court below may be considered and corrected.

Questions to Be Determined.

Under the Georgia practice following that of the common law, an injured person may in one action sue all wrongdoers. But the Georgia courts have denied petitioner this right, because he was, when injured, an interstate employee, and this will involve the consideration of the following questions:

1. Is the Federal Employers' Liability Act of 1908 so far exclusive as to destroy the common law remedies of an interstate employee against persons other than his employer who have tortiously injured him?

2. Does the Federal Employers' Liability Act contain within itself, either directly or by implication, a prohibition against joining in one suit other persons than the carrier or master whose negligence concurred in injuring an interstate employee?

3. Whether the Supreme Court of Minnesota was right in holding that an interstate employee could join in one action all tort feasors including the carrier master, and whether the courts of Georgia were in error in holding the contrary.

4. Whether the questions involved are of sufficient importance to authorize the court to issue the writ of certiorari?

BRIEF.

Tort Feasors May Be Sued Jointly or Separately at the Election of the Person Injured.

It is an universal rule that a person who has been injured by the concurrent negligence of two or more wrongdoers may bring his suit against them jointly or severally.

Ruling Case Law Vol. 20 p. 678, states the rule as follows:

> "Joint tort feasors may be sued separately or jointly at the election of the party injured and in such a case the individual and a corporation may be joined as defendants."

In the note to the text many decisions of this and other Courts are cited.

This Court has stated the rule in Powers *vs.* Chesapeake Railroad 169 U. S. p. 92 as follows:

> "The action was brought against a railroad company, and several of its servants to recover for an injury alleged to have been caused to the plaintiff by the negligence of all the defendants. It is well settled that a action of tort, which might have been

> brought against many persons or against any one or more of them, and which is brought in a State court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'a defendant has no right to say that an action shall be several, which a plaintiff elects to make joint. * * * A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to a final determination in his own way. This cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'"

In the early case of Brooks *vs.* Ashburn, 9 Ga., p. 298 (3), the Supreme Court of Georgia said:

> "Where an immediate act is done by the co-operation or the joint act of two or more persons they are all trespassers and may be sued jointly or severally, and any one of them is liable for the injury done by all."

Sutherland on Damages, Article 140, p. 432, says:

> "If injuries or damage are sustained through an affirmative act of negligence of several persons an action may be brought against all or any of them without prejudicing the plaintiff's rights."

9th Ency. of U. S. Rpts., pp. 53 and 57, quoting decisions of the Supreme Court of the United States, says:

> "A person who has suffered injury by the joint action of two or more wrongdoers may have his remedy against all or either, subject however to the condition that satisfaction once obtained is a bar to any other proceeding."

38 Cyc., 490, says:

> "In cases covered by the foregoing rule as generally stated the injured party may sue one, any or all of the joint tort feasors."

15 Ency. of Pleading and Practice, p. 557, says:

> "Where a tortious breach of duty is committed by two or more persons, each contributing to the injury as joint tort feasors, the plaintiff may at his election sue any one of them separately or he may sue all or any number of them jointly."

The general rule that all persons causing injury by their joint or concurrent negligence may be sued in one action prevails in Georgia.

The general rule is of force in Georgia. Brooks *vs.* Ashburn, 9 Ga., 298 (3); Page *vs.* Citizens Banking Co., 111 Ga., 73; Mashburn *vs.* Dannenburg Co., 117 Ga., 580; Constitution of Georgia, Code Sec. 6541; Central Ry. *vs.* Brown *et al.*, 113 Ga., 414; Sou Ry. *vs.* Grizzell, 124 Ga., 740; Cox *vs.* Strickland, 120 Ga., 104; Eining *vs.* Ga. Ry. Co., 133 Ga., 458 (2); Sou. Ry. *vs.* Cash, 131 Ga., 537; L. & N. R. R. *vs.* Roberts, 133 Ga., 270; Van Sant *vs.* Sou. Ry., 135 Ga., 444; Sou. Ry. *vs.* Miller, 1 Ga. App., 616; Finlay *vs.* Sou. Ry., 3 Ga. App., 722; A. C. L. Ry. *vs.* Bryant, 7 Ga. App., 703; Sou. Ry. *vs.* Sewell, 18 Ga. App., 544.

From the foregoing cases it will be seen that no distinction is made between the case of a servant suing a master and servant, and a case between a servant and persons occupying different relations, but in all cases the injured party may sue all persons whose acts concur in causing the injury. As said in the petition, the rule in Georgia is epitomized in the case of Sou. Ry. *vs.* Miller, 1 Ga. App., 621, where, after citing Alabama Great Sou. Ry. *vs.* Thompson, 200 U. S., 206; Ry. Co. *vs.* Dixon, 179 U. S., 131, it is said:

"The proposition that the declaration contained a misjoinder of defendants because the liability of the railway company is statutory, and that of the other defendants is common-law liability, we do not think is meritorious. We do not think it makes any difference whether the liability of one defendant arises from statute and the other from common law. The practical question to be decided is, is there a liability, and are the defendants all liable? And the particular source from which the liability of each defendant emanates cannot be material. The court's judgment is based on the liability of the defendant, whether statutory or common law, either one or both."

The authority of this case cannot be questioned, as it was affirmed by this court in Sou. Ry. *vs.* Miller, 217 U. S., 209, followed by the Supreme Court of Georgia in L. & N. R. R. *vs.* Roberts, 136 Ga., 270, and by the Court of Appeals of Georgia in Sewall *vs.* Sou. Ry., 18 Ga. App., 544.

Because petitioner was an interstate employee the court below denied him the privilege it accords to other litigants.

It follows from the foregoing that if the petitioner had not been an interstate employee he might have brought his action against the respondents without challenge and that because he was an interstate employee he has been deprived of this privilege.

As stated in the petition the record of this case illustrates with sharp emphasis the distinction made between interstate and intrastate employees.

The first count of the complaint (p. 3 of the record) alleged petitioner and the carrier to have been engaged in interstate commerce, so that a cause of action was made out against the carrier under the Federal Liability Act and against the servant respondent under the common law. In the second count it is not alleged that the petitioner was engaged in interstate commerce so that under the second

count a cause of action was made out against the carrier under the State Liability Act and against the servant respondent under the common law.

Neither by demurrer nor plea was the second count attacked for misjoinder either of parties or actions, so that if the proof had shown him to have been engaged in intrastate commerce his recovery would have been sustained without a challenge from the respondents.

It necessarily follows that for the sole reason that he was an interstate employee petitioner has been denied privileges accorded to other persons, and this leads us to an examination of the reasons given by the court for so doing.

The conclusion of the court below that the Federal act is so far exclusive as to suspend the common-law liabilities between the servants of an interstate carrier is erroneous.

The court below seems to have evolved the theory that because plaintiff and both respondents were engaged in interstate commerce, the Federal Employers' Liability Act was so far exclusive as to suspend all laws relating to either of the three parties, so that the Federal Act is the sole measure of the rights of the interstate servant as to all persons engaged with him in interstate commerce.

We submit that the statute in question contains within its terms no justification for this position.

It is true that the statute does exclude the operation of all other laws as to liability of the carrier and all its interstate employees, but it does not assume to affect the relations between the servants of the carrier. Upon the contrary the duties and liabilities of the servants as between themselves remain the same as before.

At common law the servant was liable to third persons for any act of misfeasance. This rule governs the relation in Georgia. See Sou. Ry. *vs.* Miller, 1 Ga. App. 621, citing Osborne *vs.* Morgan, 130 Mass. 102, and Sou. Ry. *vs.* Grizzell,

124 Ga. 735-6. See also Sou. Ry. *vs.* Sewall, 18 Ga. App. 544, where the authorities are reviewed.

The effect of the judgment of the court below is to destroy this right of action which one servant has against another who has wrongfully injured him, and to relieve an interstate servant from all duties and liabilities to the other servants of the master.

The error of the court below in giving such construction to the statute is so obvious that it may be contended that the court did not so decide, but such contention can have no valid foundation.

It is established by the Georgia decisions that petitioner could have sued the respondents jointly had he been an intrastate employee. This is in effect conceded by the fact that no objection of misjoinder was made to the second count of the complaint. It being true that the Georgia courts permitted an intrastate employee to sue his carrier, the master and delinquent servant in the same action, and refused this privilege to an interstate employee, because of the exclusiveness of the Federal statute, it necessarily follows that its only justification for so holding upon the theory that the statute nullifies all laws relating to servants as well as the carriers who are engaged in interstate commerce.

The Federal statute does not deal with questions of practice. It deals alone with the liability of the master to the servant, so that the question of exclusiveness could have no relation to the form of action or the question of practice relating thereto.

In fact the questions propounded by the Court of Appeals and the answer of the Supreme Court indicate that both courts had in mind that the Federal statute alone could be looked to for the relations of any party, master or servant, engaged in interstate transportation. The Court of Appeals propounded the following question:

> "May an employee of a railway company engaged in interstate commerce maintain a joint action against the company and its engineer under the Federal Em-

> ployers' Liability Act of 1908 (U. S. Comp St., 1916, 8657-8665), where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury by the plaintiff, and where also a violation of the safety appliance act of Congress (sec. 8605, *et seq.*) is charged against the carrier?"

Note the significance of the use of the words "*under* the Federal Employers' Liability Act" in both question and answer.

The Supreme Court answered as follows:

> "An employee of a railway company engaged in interstate commerce cannot maintain a joint action against the company and its engineer under the Federal Employers' Liability Act of 1908, where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury to the plaintiff. And this is true irrespective of any allegation as to a violation of the safety appliance act of Congress."

Note that the court, page 63 of the record, bases its conclusion upon the exclusiveness of the statute.

Under these considerations no other reasonable explanation can be given to the judgment of the court below, based as it was upon the exclusiveness of the Federal act, than that it deemed the Federal act to be so far exclusive as to suspend the common-law liability of the respondent servant.

It cannot be claimed that the court below was following a State practice: 1st. Because it gives only Federal reasons for its decision. 2d. The long line of authorities above cited contradicts such assertion. 3d. The fact that the second count of the petition which states facts calling into operation the State Employees Liability Act as to the master respondent, and the common law as to the servant respondent was not challenged for misjoinder, either of plaintiffs or defendants, attests the fact that the Federal grounds only were considered by the court below.

The court below erroneously construed the Federal statute by confusing the cause of action given to an injured employee with that given to an administrator for the homicide of an employee.

If it be possible that we are mistaken as to its attitude, and that the court below did not intend to hold that the Federal act was so far exclusive as to suspend the common-law liability of the servant respondent to petitioner, then it necessarily follows that it made just as serious and palpable a misconstruction of the Federal act by confusing the cause of action given by the statute to the administrator of a deceased employe in cases of homicide and the cause of action arising to an employee who has been injured, but not killed. This clearly appears from that portion of the opinion in which it cites the case of Western and Atlantic R. R. *vs.* Smith, 144 Ga., 737.

That was a case wherein parents of an intrastate servant sued the master carrier and another railroad for his homicide.

The Georgia Employers' Liability Act, Code, section 2782, (see page 24 herein), gives a cause of action to an injured employee against the carrier master, and in case of his homicide to his parents.

Under the Georgia Homicide Act, Code, section 4424 (see page 25 hereof), the cause of action against the Western and Atlantic Railroad which was not the master, was in the mother alone.

Under these conditions the court properly held there was a misjoinder of plaintiffs because the father had a right of action only against the employer railroad, and no right of action against the other, while the mother had a joint action with the father against the employer railroad and a sole right of action against the other railroad. For the same reason there was a misjoinder of defendants.

The citation of the case of W. & A. *vs.* Smith, indicates that the court confused the cause of action given to the ad-

ministrator in a case of homicide with a cause of action accruing to the employee in case of injury.

It is true that if petitioner had been killed and his administrator had sought to sue the carrier and servant respondents in the same action, there would have been a misjoinder of plaintiffs and defendants, just as there was in the case of W. & A. Railroad *vs.* Smith, because under the Federal act in cases of homicide the administrator has the cause of action, while under the State homicide act (Code, section 4424, page 25 hereof), which applies to the servant respondent, an administrator has no cause of action.

But in the present case the servant petitioner was injured, not killed.

Under the Federal act he had a cause of action against the master and under the common law he had a cause of action against the servant. In both cases the measure of damages was the same. The Federal act does not prescribe a measure of damage to an injured employee. It leaves that to be ascertained from the common law. The Federal act does not prescribe the duty of the master to its servant. The act leaves that to the common law which prescribes that ordinary care shall be used not to injure the servant. So that the plaintiff had a cause of action against both respondents for a breach of the same duties flowing from each and the same measure of damages as to each.

It is clear that the court below so far misconceived the Federal statute as to confuse the rule relating to a deceased employee with that relating to an injured employee.

Note that in the opinion (p. 63 of the record) the court below said:

> "In the case of W. & A. R. R. *vs.* Smith, 144 Ga. 737, this court decided that in a suit under the State law *an employee* (italics ours) of a railroad company could not join as defendants in the same action, the employer company and another railroad company."

This application of the cited case was wholly inaccurate, because the case of W. & A. R. R. *vs.* Smith was the case of the parents suing for a homicide of their son employee, while the case at bar is that of an injured employee suing for his injuries.

The cited case in stating the case it then had before it began by saying:

> "A *father and mother* (italics ours) instituted an action against two railroad companies for the homicide of their son * * * who had never been married, and upon whose estate there was no administration."

It will be noted that the Georgia Act is identical with the Federal Act except that in case of homicide the beneficiaries may sue where no administrator has been appointed and the measure of recovery is prescribed.

So it is evident that the court below entirely misconceived the purpose of the Federal statute and evolved the conception that under its terms the same rule applied to an injured employee which applies to his homicide.

Such a conclusion is so illogical that it can hardly be believed that an appellate court could so far misconceive the plain terms of the statute, but necessarily it is true either that the court below came to the conclusion that the Federal statute was so far exclusive as to embrace within its terms all the rights of an injured servant against all parties, even suspending the common-law liabilities of an offending co-servant, or that it so far misconceived the purport of the Federal statute as to confuse the cause of action given to an administrator of a deceased servant with the cause of action which inures to an injured servant. In either case the result of the decision is so novel and is of such far-reaching effect as to demand inquiry and correction by this court.

The conflict between the court below and the Supreme Court of Minnesota is irreconcilable.

We submit that the case of Doyle *vs.* St. Paul, 159 N. W., 1081; 134 Minn., 461, contains the true rule. The court there held in terms that there is no misjoinder where a plaintiff joins two defendants in one action, the liability of the one arising upon the Federal Employers' Liability Act and the other upon the common law.

The only difference between the Doyle case and the case at bar is that the master's co-defendant in the Doyle case was a corporation while in the case at bar the master's co-defendant was a servant, who, like petitioner, was engaged in interstate commerce.

In both cases the injured servant had a cause of action against each of the defendants, the measure of damages as to each being that prescribed by the common law and the measure of the duty required by each being prescribed by the common law.

The courts of Minnesota and Georgia are in unreconcilable conflict. The Minnesota courts accord to an interstate employee the same privileges they accord to other litigants, while in Georgia the interstate employee is denied the privilege accorded other litigants.

Surely this conflict should be corrected and the rule definitely laid down along the lines of the Minnesota case which is in harmony with all rules of pleading, ancient and modern.

Erroneous conception of the court below as to the import of the Federal statute.

The court below in conclusion (see pp. 63 and 64 of the record) argues as follows:

> "A conclusion contrary to the one stated above, even if it could be reconciled with the Federal statute, would lead to confusion and injustice. Under

> our Civil Code, sec. 4513, 'if judgment is entered jointly against several trespassers and is paid off by one, the others shall be liable to him for contribution.' If the carrier and its engineer were jointly liable under the conditions stated in the second question a joint judgment would result against them, and they would be equally bound regardless of the fact that the duties imposed upon them are not the same. The jury would have no power in such a case to specify the particular damages to be recovered by each."

This we submit is an erroneous view of the duty of the court, an erroneous interpretation of the act, and affords no justification for the discrimination made against an interstate employee.

It is seen from the Miller case cited and quoted, page 5 hereof, and the case of L. & N. R. R. *vs.* Roberts, 136 Ga., 270, and Sou. Ry. *vs.* Miller, 217 U. S., 209, that these difficulties do not bar the right of an intrasate employee to sue his master and any number of servants in the same action.

This being true, there can be no justification for the discrimination here declared against the interstate employee.

The courts cannot decline jurisdiction of a case because of the difficulties attending the trial. This court in Mondou *vs.* N. Y., N. H. and Hartford R. R., 223 U. S., pp. 58 and 59, answering this argument said:

> "We are not disposed to believe that the exercise of jurisdiction by the State courts will be attended by any appreciable inconvenience or confusion; but be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon whether the injured per-

> son was a passenger, an employee or a stranger. But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases."

Besides the difficulties referred to are not such as are recognized by courts. It has always been held that the fact that various defendant tort feasors having different defenses is no objection to their joinder in the same suit. (See quotation from Powers *vs.* Chesapeake, p. § hereof.)

See also A., G. S. R. R. *vs.* Thompson, 200 U. S., 218, where it is said:

> "The fact that by answer the defendant may show liability is several, cannot change the character of the case made by plaintiff in his pleading so as to effect the right of removal."

See also Sou. Ry. *vs.* Carson, 194 U. S., p. 139, where it is said:

> "A separate defense may defeat a joint recovery but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy; and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings."

Emphasis is laid by the court below upon the fact that the jury has no power to specify the particular damages to be recovered of each defendant; but it gives no reason why this fact should operate against the interstate employer and not against other persons.

In the Miller case, 217 U. S., 209, as well as other cases cited *supra*, the verdict was grounded against all defendants without reference to their degree of culpability, yet this court as well as the court below held that this fact furnished no cause for misjoinder, and we submit that the Federal

statute affords no just cause for this discrimination against an inter-state employee.

The fact that a jury cannot apportion, but must render a round verdict is the settled law as to all tort feasors whenever the same has not been changed by statute and affords no ground of misjoinder. Cooley on Torts, 2nd Ed., p. 153, states the proposition as follows:

> "Wrongs Intended.—When several persons unite in an act which constitutes a wrong to another, intending at the time to commit it, or doing it under circumstances which fairly charge them with intending the consequences which follow, it is a very reasonable and just rule of law which compels each to assume and bear the responsibility of the misconduct of all. To require the party injured to ascertain and point out how much of the injury was done by one person and how much by another, or what share of responsibility is fairly attributable to each as between themselves, and to leave this to be apportioned among them by the jury according to the mischief found to have been done by each, would, in many cases, be equivalent to a practical denial of justice. The law does not require this, but on the other hand, permits the party injured to treat all concerned in the injury as constituting together one party, by their joint co-operation accomplishing certain injurious results and liable to respond to him in a gross sum as damages."

In 28 Am. & Eng. Ency. of Law p. 570 it is said that where wrongdoers are sued jointly, it is the universal rule that the verdict must be in one sum. It must be against all for the highest damage done by one.

In 38 Cyc. p. 492 it is said:

> "Damages may be assessed in a single sum. They cannot be apportioned by the jury among defendants, for the sole inquiry open is what damages plaintiff has sustained, not who ought to pay them. Discrimination according to the relative enormity of the acts

> of each is not permitted. Should the jury assess different amounts, plaintiff should have judgment against all convicted for the largest sum found against anyone of them, for where no punitive damages are claimed, plaintiff is entitled to a joint verdict, for what the most culpable ought to pay."

We submit that the Court below made a wholly erroneous construction of the Federal Liability Act. Under that act the measure of damages is that prescribed by the common law. The Act gives the right to recover damages, but leaves the measure of damages to be ascertained from the common law. As the action against the servant arose from the common law it follows that the measure of damage was the same as to both.

Likewise the Federal Act does not undertake to prescribe the duty of the carrier employee to its servant, but leaves the measure of duty to be ascertained from the common law; as the action against the servant arose from the common law it follows that the measure of his duty to the plaintiff was the same as the carrier.

So that the court below was erroneous in its conclusion that there were different measures of damages and different duties from the respective defendants.

It is true that the Federal Act restricts the carriers' defenses of contributory negligence and assumption of risk, but these are purely defensive matters, and as seen from the cases of Chesapeake R. R. vs. Powers, 169 U. S., 92; Sou. Ry. *vs.* Carson, 194 U. S., 139; A. G. S. Ry. *vs.* Thompson, 200 U. S., 218, it is no cause of misjoinder that different defendants have different defenses.

The case of Sou. Ry. *vs.* Carson, 194 U. S., 136, is decisive of this question.

In that case Carson brought his action against the carrier master and negligent servants. One of the specifications of negligence was that one of the automatic couplers "was not in proper condition which rendered it necessary for

plaintiff to go between the cars to effect the coupling, and that the accident thereupon happened by reason of defendants' joint and concurrent negligence, carelessness, recklessness, etc., in particulars detailed."

In the Carson case under the Safety Appliance Act the carrier defendant was deprived of the defense of assumption of risk. The other defendants could make this defense. This court held that the defendants were properly joined and that the parties defendant were deprived of no Federal right by reason of this joinder, and that this was true even though a round verdict was rendered and the master could not call on the servants for contribution.

For all the foregoing reasons we submit there is no justification for the interpretation placed upon the Federal Liability Act by the court below.

Conclusion.

We submit that an interstate employee has the right when injured to sue in State courts upon the same equality as an intrastate servant and that the court below deprived petitioner of a valuable Federal right in the discrimination practiced against him, and because of this error of the court below, its far-reaching effect, its novelty, and its conflict with the decision of the Supreme Court of Minnesota and the principles of the common law, we submit that the certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

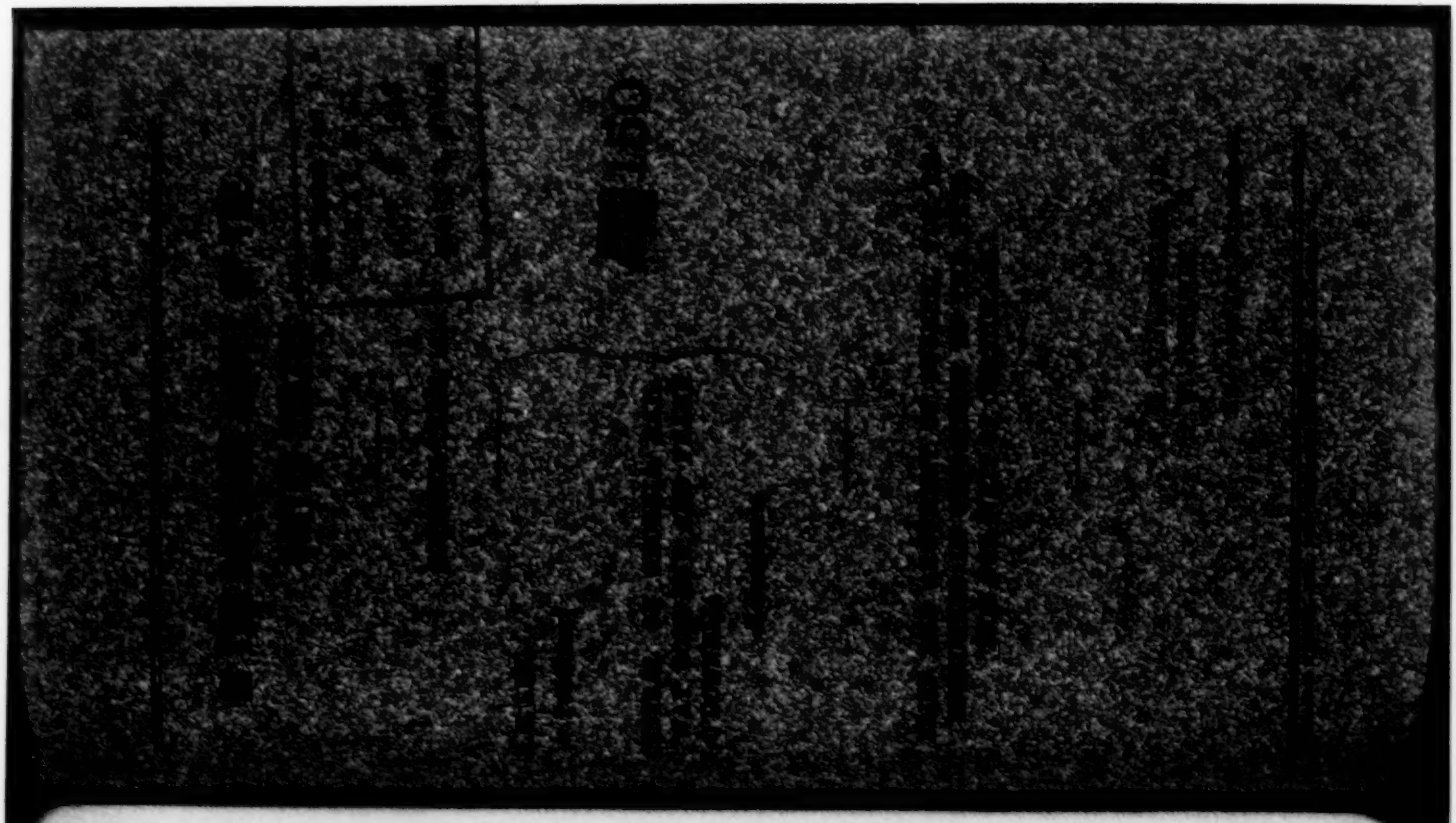
APPENDIX.

"2728. Injury by Coemployee.—Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband or child, or children of such employee, and if none then of such employee's parents, and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defects or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves or other equipment: *Provided*, nevertheless, no recovery shall be had hereunder if the person killed or injured brought about his death or injury by his own carelessness amounting to a failure to exercise ordinary care; or if he, by the exercise of ordinary care could have avoided the consequences of the defendant's negligence. The measure of damage in case the injury results in death of the employee shall be that prescribed in sections 4424 and 4425; *Provided*, that the party or parties for whose benefit recovery may be had under this and the five succeeding sections may sue and recover in their own name or names in the manner prescribed by section 4424, in case no administration or executor has been appointed at the time suit is filed. In case death results from injury to the employee, the employer shall be liable unless it make it appear that it, its agents, and employees have exercised all ordinary and reasonable care and diligence, the presumption being in all cases against the employer. If death does not result from the injury, the presumption of negligence

shall be and remain as now provided by law in case of injury received by an employee in the service of a railroad company."

This section was codified from Georgia Acts, 1909, p. 100. The balance of the Georgia Statute as codified is a substantial copy of the Federal Employers' Liability Act.

"4424. Recovery of Homicide When.—A widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent; and if suit be brought by the widow or children, and the former or one of the latter dies pending the action, the same shall survive in the first case to the children, and in the latter to the surviving child or children. The husband may recover for the homicide of his wife, and if she leaves child or children surviving, said husband and children shall sue jointly, and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action. A mother, or, if no mother, a father, may recover for the homicide of a child minor or *sui juris*, upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband or child. Said mother or father shall be entitled to recover the full value of the life of said child."



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

B. C. LEE,
Petitioner,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY AND FRANK O'DONNELL,
Respondents.

No. 528

BRIEF AND ARGUMENT OF COUNSEL FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE

In an action under the Federal Employers Liability Act the plaintiff seeks to maintain a **joint liability** against the Railway Company and O'Donnell, its engineer, as joint trespassers under the following provision of Sec. 4512 of the Civil Code of Georgia of 1910:

> "Where several trespassers are sued jointly, the plaintiff may recover against all damages for the greatest injury done by either. * * *."

It was sought to hold the Railway Company liable under the Act of Congress and the individual defendant under the Georgia law. It was also alleged that the Railway Company was guilty of a violation of the Safety Appliance Act of Congress which contributed to the plaintiff's injury. The Court of Appeals of the State of Georgia, under instructions from the Supreme Court of the State, held that there was a misjoinder of parties and of causes of action. Plaintiff refused to amend in order to avoid this misjoinder, and the case was dismissed upon demurrer.

Lee vs. Central of Georgia Ry. Co., et al., 147 Ga., 428;
s. c. (Ga. App.) 94 S. E. Rep., 888;
s. c. (Ga. App.) 95 S. E. Rep., 718.
(Record, pp. 62, 64, 74.)

Whether this ruling of the State Court operated as a denial of a right or immunity to which the plaintiff was entitled under the Federal Act is the only question for consideration of this Court.

I.

The State Court properly held that an action against the Railway Company and its engineer as joint trespassers can not be maintained under the Federal Employers Liability Act.

A joint liability of the common carrier with others who may be sued as joint tort feasors is manifestly inconsistent with the scope and purpose of the Federal Act. Under the decisions of this Court it can not now be doubted that by this act Congress has taken complete charge of the subject matter of the liability of common carriers by railroads engaged in interstate commerce to their employes injured or

killed while employed in such commerce; that the Act is paramount and supersedes all State legislation on the subject; that it can not be supplemented or pieced out by the laws of a State; and that the Act is exclusive in its operation, not merely cumulative.

In the case of Michigan Central Railroad vs. Vreeland, ~~227~~ 227 U. S. 59, it was said:

> "A federal statute upon a subject exclusively under federal control must be construed by itself and can not be pieced out by State legislation. If a liability does not exist under the Employers Liability Act of 1908, it does not exist by virtue of any State legislation on the subject."

In the case of Seaboard Air Line Railway vs. Kenny, 240 U. S., 489, 493, this Court said:

> "There can be now no question that the Act of Congress insofar as it deals with the subjects to which it relates, is paramount and exclusive. It is therefore not disputable that recovery under the Act can be had alone in the mode and by and for the persons or class of persons in whose favor the law creates and bestows a right of action."

In a recent case this Court held:

> "The liabilities and obligations of interstate railroad carriers to make compensation for personal injuries suffered by their employes while engaged in interstate commerce are regulated both inclusively and exclusively by the Federal Employers Liability Act; Congress having thus fully covered the subject no room exists

for State regulation, even in respect of injuries occurring without fault as to which the Federal Act provides no remedy."

N. Y. Central R. Co. vs. Winfield, 244 U. S., 147.

It is certain that a **joint liability,** such as the plaintiff seeks to impose in this case, does not exist under the terms of the Employers Liability Act, and therefore such joint liability can not exist or be authorized by virtue of any State statute in a case where the Federal Act applies. This national statute provides only for liability of "every common carrier by railroad." It does not create liability against co-employes, nor does it provide for liability as in cases of joint trespassers. In the case of New York Central Railroad vs. Winfield, supra, this Court referred to and quoted the report of the House Committee having in charge the bill as showing its purpose to "withdraw all injuries to railroad employes in interstate commerce from the operation of varying State laws and to apply to them a national law having a uniform operation throughout all the States." It was further said in the same case that "there are weighty considerations why the controlling law should be uniform and not change at every State line." (N. Y. C. R. R. vs. Winfield, 244 U. S. 147, 149, 150).

Having in view the effect and operation of the Federal Employers Liability Act and its object and purpose as declared in numerous decisions by this Court, it is manifest that the Supreme Court of Georgia correctly answered the question submitted by the State Court of Appeals, to the effect that there could not be a joinder of the defendants in this case. It is plainly evident that if the constitution or statutes of a State could be thus invoked to create a **joint liability** against several defendants in a case arising under the Federal Act, then the exclusive right to regulate the liability of an interstate employer to its employes, which

Congress intended by the passage of the Act, would be wholly lost. In actions against the interstate employer and other joint defendants the regulation as well as the measure of such liability would be absolutely controlled by the various State statutes, because the liability of joint trespassers or tort feasors is measured and regulated by State laws which in Georgia, as in most of the other States, provide that each joint trespasser defendant may be held liable for the greatest injury done by the most culpable.

Simpson vs. Perry, 9 Ga., 508, 509;
Washington Gas Light Co. vs. Lansden, 172 U. S., 534, 552.

The attempted joinder of the defendant in this action is necessarily based on the statute of the State which authorizes suits against joint trespassers. It is clear that if a State may authorize a suit against a common carrier by railroad subject to this Act as one of several joint tort feasors, and provide for and fix the liability of the joint defendants *inter sese*, as the Georgia statute does (Sec. 4512, Code of Georgia of 1910), then necessarily the liability of the railway company will be measured by the terms of the State law and not by the Act of Congress, for the liability of one is the liability of all the others against whom the verdict is rendered. That portion of this Georgia statute which authorizes the jury to specify the particular damage to be recovered of each defendant does not apply to personal torts. The jury trying the case at bar could not apportion damages between the defendants, but were required to return a verdict for one amount jointly against both defendants. (Hunter vs. Wakefield, 97 Ga., 543; Hay vs. Collins, 118 Ga., 243; Lee vs. C. of Ga. Ry., et al. 147 Ga., 428). A joint judgment based upon a single verdict against defendants as joint tort feasors is necessarily a judgment under the common or statute law of the State; it can not be founded upon anything else. It is the State law, not the Federal Act, that

provides for and fixes the joint liability of the defendants in actions against joint trespassers and renders each one liable for the damages done by all who are found guilty in any degree. To permit a recovery upon the joinder of a railroad with other defendants as joint tort feasors in cases to which the Federal Act applies would effectually nullify the declared purpose of this Act of Congress, which was to establish an exclusive remedy for the employe, and a uniform rule of liability for the employer; and would instead permit as many different remedies and rules of liability as the separate State legislatures might enact.

In the case of Seaboard Air Line Railway vs. Horton, 233 U. S., 492, it was held that the State legislature had no power to determine the effect of contributory negligence or assumption of risk in cases under the Federal Act, "since this would, in effect, relegate to State control two of the essential factors that determine the responsibility of the employer." If a State may not control any of the essential factors that determine the responsibility of the employer, assuredly it may not control the entire result as it would do if it could authorize an action against the interstate employer as one of several joint tort feasors and permit the plaintiff to recover against all damages for the greatest injury done by either.

It is manifest that if it be legal to join as a tort feasor with the employer one of the co-employes of the plaintiff, it would be legal to join any one or more third persons, either individuals or corporations, whose concurrent negligence contributed to the injury. It is also manifest that if the Georgia statute may be applied to such cases, and the Federal employer made liable for the greatest injury done by any of its co-defendants, different rules of liability may be established under the statutes of the several States. It is not difficult to imagine the many "factors" arising out of State laws which would in such procedure determine the

right of the employe and measure the liability of the interstate employer, so that the declared purpose of the Act would by this means be entirely destroyed. It is certain that the terms of the Federal Act do not authorize such joinder of defendants, and its object and purpose exclude any implication that it may be done.

There are many instances of collisions at grade crossings between the trains of separate railroads. In such cases, the liability of the employer to its injured employe engaged in interstate commerce would depend not upon its own negligence alone, but also upon the negligence, however culpable, of the other railroad and its servants—if it be legally true that a plaintiff may rightfully join his employer in an action under the Federal Act with other defendants and obtain against all a single judgment "for the greatest injury done by either."

If in lieu of the general State statute regarding joinder and liability of joint trespassers as contained in the Georgia Code, Sec. 4512, which the plaintiff invokes to uphold a joint liability in this case, the State legislature should adopt an act to the same effect, but applicable by its terms to interstate employers so that, for instance, the law would read—

> Where a common carrier by railroad engaged in interstate commerce is one of several trespassers who are sued jointly by its employe engaged in such commerce, the plaintiff may recover against all damages for the greatest injury done by either,—

could any one contend that it would be competent for the State to pass such a statute, or that the joint liability and judgment, for which plaintiff insists, could be maintained thereunder? Certainly not; and yet the plaintiff in the case at bar invokes the general law of the State regarding

joinder and joint liability of tort feasors to do that which it must be conceded could not be done by specific State legislation. If the joinder and joint liability for which the plaintiff contends could not be accomplished directly by State legislation, it certainly can not be secured indirectly through a general statute of the State.

Cases which hold that there can not be a joinder of tort feasors under the Federal Employers Liability Act, because by its terms liability thereunder is limited to common carriers engaged in interstate commerce, are:

Kelly's Administrators vs. C. & O. Ry., et al., 201 Fed. 602;

Thompson vs. C. N. O. & T. P. Ry., et al., (Ky.), 176 S. W. Rep., 1006 (2).

See also:

Taylor vs. Sou. Ry. Co., 178 Fed. 380;

Richey Fed. Em. L. Act (2d Ed.) Sec. 128 and authorities cited.

The Supreme Court of the State in the case at bar referred to the "confusion and injustice" which would result if joinder of the employer and the co-employe as joint trespassers was allowed. This confusion and injustice is emphasized on consideration of section 3 of the Federal Employers Liability Act which provides that "the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damage shall be diminished by the jury in proportion to the amount of negligence attributable to such employe, provided, however, that no employe shall be held to have been guilty of contributory negligence in any case where the violation by the carrier of a statute enacted for the safety of employes contributed to the injury." The question naturally arises, how would it be possible to have a verdict and judgment based upon the

comparative negligence of the employe and employer alone where the latter is joined as one of several tort feasors, and a single verdict and joint judgment is rendered "for the greatest injury done by either" of the defendants? That is the language of the Georgia statute which authorizes suits against joint trespassers on which the attempted joinder of the defendant in this case is based. (Code of Georgia of 1910, Sec. 4512).

Again, this "confusion and injustice" is especially apparent in regard to the individual co-defendant where there is a violation by the defendant railway company of the Safety Appliance Act of Congress as alleged in the present case. The individual defendant had no duty or obligation in regard to the maintenance of the safety appliance, but his co-defendant, the railway company, had, and if a failure to comply with the Safety Appliance Act contributed to the injury in any respect, whether the failure was due to negligence on the part of the railway company or not, the individual defendant is made liable with the railway company for the whole damage if they are suable as joint trespassers.

> "Disregard of the Safety Appliance Act is a wrongful act; and where it results in damage to one of the class for whose especial benefit it was enacted, the right to recover damages from the party in default is implied."
>
> Texas & Pac. Ry. Co. vs. Rigsby, 241 U. S. 33 (1).

The railway company is denied the right to plead contributory negligence or assumption of risk on the part of the injured employe in such cases, and hence the individual co-defendant is thereby effectively cut off from any defense of contributory negligence on the part of the plaintiff, because under the Georgia law "where several trespassers are

sued jointly the plaintiff may recover against all damages for the greatest injury done by either." As the Supreme Court of Georgia said in this case:

> "If the carrier and its engineer were jointly liable under the conditions stated in the second question a joint judgment would result against them, and they would be equally bound regardless of the fact that the duties imposed upon them are not the same. The jury would have no power in such a case to specify the particular damage to be recovered of each, since Civil Code, Sec. 4512 is not applicable to personal torts."

Lee vs. Central of Ga. Ry. Co., et al., 147 Ga., 428, 431;
94 S. E. Rep., 558, 560.

II.

Plaintiff has not been deprived of any Federal right or privilege; nor does this case involve any construction of the Federal Employers Liability Act.

It is apparent that plaintiff has not been denied any right or privilege accruing to him under the Federal statute and that there is nothing to justify this Court in granting the writ of certiorari. The case does not involve a construction of the Federal Employers Liability Act. It is only in matters involving a **construction** of the Act that this Court will review the judgment of a State Court in an action thereunder.

Central Vermont Ry. vs. White, 238 U. S., 507 (2);
Seaboard Air Line Ry. vs. Duvall, 225 U. S., 477, 486.

Plaintiff contends that the Georgia Supreme Court erred in holding that the Federal Employers Liability Act is so far exclusive as to deprive him of his remedies against other persons. But we respectfully submit that the Supreme Court of Georgia did not so hold. The plaintiff has not been prevented from asserting any separate remedy or right of action against either defendant; he has simply been prevented from obtaining a **joint judgment** against both defendants in one action—a remedy which it is certain the Federal Act does not in terms convey, but which, on the contrary, if allowed, is destructive of its primary purpose.

It is apparent that the State Supreme Court ruled that **the joinder of defendants was not permissible under the State practice and procedure without regard to the Federal statute.** The Georgia Supreme Court cited in the case at bar its own previous decision, Western & Atlantic R. R. vs. Smith, 144 Ga., 737, an action based upon the State Liability Act, in which that Court had held that the employer could not be joined as a defendant with one who was not the employer. The Court of Appeals was instructed by the State Supreme Court in the present case, that to "join defendants in one suit they must owe the same duty," and that "where there is no joint duty there can be no joinder." This was said quite apart from any consideration of the Federal Employers Liability Act. Under the Georgia law the Court of Appeals is bound by the decisions and instructions of the Supreme Court of the State (Article VI, Sec. 2, Par. 9, Constitution of the State of Georgia, as amended by Acts of 1916, pp. 19, 20; Sec. 6506, Parks Annotated Code of Georgia, 1917 Supplement).

The decision of the State Supreme Court, so far at least as any joint action against the individual defendant is concerned, is final and conclusive on this question, since the Federal Employers Liability Act does not expressly or impliedly give an injured employe any right of action against

his co-employe. The attempted joinder of the defendant O'Donnell in this case involves his rights and defenses as well as those of the interstate railroad carrier. Would it be competent for this Court, even if it should entertain a different view from the State Supreme Court, to reverse the judgment below with direction which would have the effect to subject the individual defendant to a **joint judgment** with the railway company? The co-employe is not made liable either jointly or severally to the injured employe under the Federal Act. How then would it be competent for this Court to declare, in opposition to the decision of the State Supreme Court, that he should have been **jointly bound** with the railway company in this action?

In the improbable event that this Court should now conclude that the employer might be joined with one or several joint trespassers in an action under the National statute—that a **joint liability** of the Federal employer with co-trespassers "for the greatest injury done by either" is consistent with the object and purpose of the Federal Employers Liability Act—even so, under the State practice as declared by the Supreme Court of Georgia, it would still not be permissible for the plaintiff to subject the other co-defendant to a joint judgment in this State Court action. Since the Federal statute does not require or authorize such joinder it is clear that the question of misjoinder, **as to the individual defendant at least,** is a matter of State pleading and practice on which the decision of the State Supreme Court is binding upon this Court.

> Central Vermont Ry. Co. vs. White, 238 U. S., 507, 513.

In a case which did not involve the Federal Employers Liability Act, this Court said:

"Whether there was a joint liability of defendants sued jointly for negligence is a matter of State law and this Court will not go behind the decision of the highest Court of the State to which the question can go."

C. R. I. & P. Ry. vs. Schwyhart, 227 U. S., 184 (1).

"Where the judgment of the State Court rests on a matter of general law strong enough to sustain the judgment, this Court can not consider the Federal question involved; even if it were actually considered by the State Court and determined adversely to plaintiff in error."

Gaar, Scott & Co. vs. Shannon, 223 U. S., 468 (1).

The State Court may not refuse to entertain an action against the employer under the Federal Act, but certainly it may decline to permit that which the Federal Act itself does not authorize, the joinder of the employer with one who does not sustain that relation to the plaintiff.

In support of their argument that the decision of the State Court operates as a discrimination against the interstate employe, counsel for petitioner say:

"A striking illustration of this inconsistency and injustice is found in the present record. The complaint is in two counts. The first is based upon the Federal Act (p. 3 of record). The second is based upon the State Liability Act (p. 5 of record). No complaint of misjoinder was made or adjudicated as to the second count, so that if petitioner had been injured while engaged in intrastate commerce he might, without challenge, have maintained his action against both respondents" (p. 3, brief in support of petition).

Reference to the record will show that this statement is entirely erroneous. Both defendants demurred to the whole petition (which included the two counts) for misjoinder of parties defendant. (See par. 3 of the railway company's demurrer, record, p. 43, and par. 4 of O'Donnell's demurrer, record, p. 45). On the trial plaintiff expressly abandoned the second count of the petition which was based on the State law (see recital in charge of the Court, record, p. 52; specification 1 in bill of exceptions, record, p. 70; opinion of Court of Appeals, record, p. 65); therefore the Court of Appeals could not and did not in this case pass upon the question of misjoinder of defendants under the second count. The case was tried in the lower Court and decided in the Court of Appeals, solely upon the first count of the petition which was based upon the Federal Act. But if the Appellate Court had considered the demurrer in relation to the second count there can be no doubt that it would have held there was a misjoinder of defendants, as it did in a prior case under the State Liability Act.

W. & A. R. R. vs. Smith, supra.

Counsel for petitioner refer to the Minnesota case, Doyle vs. St. Paul Union Station Co., et al., 134 Minn., 461, 159 N. W., 1081, as being in conflict with the decision of the Georgia Court in the case at bar and urge this as a reason for granting the writ of certiorari. But the difference between the Minnesota practice and the Georgia practice renders any supposed conflict in these decisions of no importance. The Minnesota law provides that the jury may return a verdict in different amounts against the several defendants who are sued as joint trespassers. This is manifest from the following language of the Court in the Doyle case:

> "That the measure and amount of recovery against different defendants may be different, and in supposable cases they might be, is not important. If the de-

fendants are liable in different amount, their different liabilities can be found and declared. See Rauma vs. Lamont, 82 Minn., 477, 85 N. W., 236."

Ib., page 1082.

In the case at bar, on the contrary, the Georgia statute under which the joinder was made provides a directly opposite rule:

"Where several trespassers are sued jointly, the plaintiff may recover against all damages for the greatest injury done by either."

Ga. Civil Code of 1910, Sec. 4512.

Under the Georgia law the jury trying the case can not apportion the damages between the defendants in cases against joint trespassers. Lee vs. Central of Ga. Ry. Co., 147 Ga., 428, 431. The important distinction is, therefore, that a defendant Federal employer in a suit against it as one of several joint trespassers under the Georgia statute is bound to respond for damages for the greatest injury done by either one of its joint tort feasors, and the Federal Employers Liability Act, instead of being exclusive as Congress intended, is completely set aside by the State law. In other words, the Georgia statute, in measuring the damages against all the joint trespassers according to the greatest injury done by either, is the law which really governs the case and not the Federal Employers Liability Act which should, by reason of its supremacy, control the ultimate liability of the Federal employer.

For these reasons, it may be that in Minnesota a defendant employer liable under the Federal Act might be joined with other defendants and the verdict so apportioned between the defendants as not to affect the exclusive char-

acter of the National statute. However, this point was not presented or argued in the Minnesota case, but the Supreme Court of that State simply cited and followed its own decisions which adopted the general rule in regard to joinder of joint trespassers long before the passage of the Federal Employers Liability Act.

We submit that the decision of the Court of Appeals and of the Supreme Court of Georgia in this case was entirely right; that the petitioner has not been denied any right, privilege, or immunity under the Federal Act; and that there is nothing in this case which would justify the issuance of the writ of certiorari.

Respectfully submitted,

J. M. Cunningham

W. W. Johnson

Attorneys for Respondents.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

B. C. LEE,
Petitioner

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY, et al.,
Respondents.

No. 150

CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

BRIEF AND ARGUMENT OF COUNSEL FOR PLAINTIFF IN CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

B. C. LEE,
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vs.

CENTRAL OF GEORGIA RAILWAY COMPANY, et al.,
Respondents.

No. 150

CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

BRIEF AND ARGUMENT OF COUNSEL FOR PLAINTIFF IN CERTIORARI

STATEMENT OF THE CASE

Petitioner, while employed as a flagman and engaged in interstate commerce, was injured by the concurrent negligence of respondents. He brought a joint action against the master carrier and the servant engineer. His complaint was

in two counts. In the first (see p. 3 of the record) it was alleged that he and the carrier were engaged in interstate service. This allegation was omitted from the second count (see p. 5 of the record). To this complaint defendants demurred upon the ground that there was in the first count a misjoinder of parties and actions (see demurrers of O'Donnell, pp. 44-45-46 of the record, and amendment to the demurrer of the company, p. 64 of the record, and amendment to demurrer of O'Donnell, p. 46 of the record). The same question was raised by answer. (See amendments to the answer of respondents, pp. 9-11 of the record). The trial Court overruled the demurrers and struck the pleas. The case proceeded to trial and a verdict was returned for the plaintiff. A new trial was granted and the second trial resulted in a verdict for petitioner. This was again set aside by the trial judge, and petitioner carried the case to the Court of Appeals by writ of error. That Court certified two questions to the Supreme Court of Georgia (see p. 60 of the record). The first involved the question as to the constitutionality of a statute prohibiting the grant of a second new trial except for errors of law.

The second question was as follows:

> "May an employe of a railway company engaged in interstate commerce maintain a joint action against the company and its engineer under the Federal Employers' Liability Act of 1908 (U. S. Comp. St., 1916, 8657-8665), where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury by the plaintiff, and where also a violation of the safety appliance act of Congress (section 8605 et seq.) is charged against the carrier?"

To the first question propounded the Supreme Court answered that the record presented no question involving the constitutionality of the statute in question (see p. 62 of the record).

To the second inquiry the Court answered:

> "An employe of a railway company engaged in interstate commerce cannot maintain a joint action against the company and its engineer under the Federal Employers' Liability Act of 1908, where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury to the plaintiff. And this is true irrespective of any allegation as to a violation of the Safety Appliance Act of Congress." (See p. 63 of the record).

The Court of Appeals complying with these instructions reversed the trial Court (see p. 64 of the record) and thereafter the trial Court entered final judgment dismissing the cause (see p. 73 of the record). To this judgment of the trial Court petitioner sued out a writ of error to the Court of Appeals, which affirmed the judgment of the lower Court (see p. 74 of the record). Petitioner then applied to the Supreme Court of Georgia for a certiorari under the provisions of the Georgia constitution, which as amended (see p. 19 Georgia Laws, 1916), provided as follows:

> "It shall be competent for the Supreme Court to require, by certiorari or otherwise, any cause to be certified to the Supreme Court from the Court of Appeals for review and determination with the same power and authority as if the case had been carried by writ of error to the Supreme Court."

This petition was denied (see p. 75 of the record).

The case now having the finality requisite under the case of Bruse, Administrator vs. William Tobin, 245 U. S., p. 18, and the Court of Appeals being the highest court of the State to which an appeal lay within the contemplation of the statute as construed in Sullivan vs. Texas, 207 U. S., 416, petitioner applied for a certiorari which was granted.

QUESTIONS TO BE DETERMINED

Under the Georgia practice following that of the common law, an injured person may in one action sue all wrong doers. But the Georgia courts have denied petitioner this right, because he was, when injured, an interstate employee, and this will involve the consideration of the following questions:

1. Is the Federal Employers' Liability Act of 1908 so far exclusive as to destroy the common law remedies of an interstate employe against persons other than his employer who have tortiously injured him?

2. Does the Federal Employers' Liability Act contain within itself, either directly or by implication, a prohibition against joining in one suit other persons than the carrier or master whose negligence concurred in injuring an interstate employe?

BRIEF

TORT FEASORS MAY BE SUED JOINTLY OR SEPARATELY AT THE ELECTION OF THE PERSON INJURED.

It is an universal rule that a person who has been injured by the concurrent negligence of two or more wrongdoers may bring his suit against them jointly or severally.

Ruling Case Law Vol. 20, p. 678, states the rule as follows:

> "Joint tort feasors may be sued separately or jointly at the election of the party injured and in such a case the individual and a corporation may be joined as defendants."

In the note to the text many decisions of this and other Courts are cited.

This Court has stated the rule in Powers vs. Chesapeake Railroad, 169 U. S., p. 92, as follows:

> "The action was brought against a railroad company, and several of its servants to recover for an injury alleged to have been caused to the plaintiff by the negligence of all the defendants. It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a State Court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this Court has often said, 'a defendant has no right to say that an action shall be several, which a plaintiff elects to make joint * * * A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to a final determination in his own way. This cause of action is the subject matter of the controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings'."

In the early case of Brooks vs. Ashburn, 9 Ga., p. 298 (3) the Supreme Court of Georgia said:

> "Where an immediate act is done by the co-operation or the joint act of two or more persons they are all trespassers and may be sued jointly or severally and any one of them is liable for the injury done by all."

Sutherland on Damages, Article 140, p. 432, says:

> "If injuries or damages are sustained through an affirmative act of negligence of several persons an action may be brought against all or any of them without prejudicing the plaintiff's right."

Ninth Ency. of U. S. Rpts., pp. 53 and 57, citing decisions of the Supreme Court of the United States, says:

> "A person who has suffered injury by the joint action of two or more wrongdoers may have his remedy against all or either, subject, however, to the conditions that satisfaction once obtained is a bar to any other proceedings."

Thirty-eighth Cyc. 490 says:

> "In cases covered by the foregoing rule as generally stated the injured party may sue one, any or all of the joint tort feasors."

Fifteenth Ency. of Pleading and Practice, p. 557, says:

> "Where a tortious breach of duty is committed by two or more persons, each contributing to the injury as joint tort feasors, the plaintiff may at his election sue any one of them separately or he may sue all or any number of them jointly."

IT IS NOT NECESSARY THAT THERE BE CONCERT OF ACTION—IF INDEPENDENT ACTS COMBINE TO PRODUCE THE RESULT THEN ALL ARE LIABLE.

Where though concert is lacking, the separate and independent acts of negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it.

38 Cyc., 488 (f).

Several persons acting independently but causing together a single injury are joint tort feasors within the rule, and may be sued either jointly or severally. In other words, it is not always essential that defendants shall have acted in concert in order to render them liable as joint tort feasors.

15 Ency. P. & P., 558.

Where the injury is the result of concurring negligence of two or more parties they may be sued jointly or severally. All may be sued jointly notwithstanding different degrees of care—may be owed by the different defendants.

29 Cyc., 564, 565 b., "defendants."

Joint negligence exists where two or more persons are jointly concerned in the negligence causing the injury. They may be thus concerned by their co-operating or acting together, or by being joint enterprisers, engaged in a common enterprise. The definition of joint tort feasors applies. Concurrent, as distinguished from joint negligence, arises where the injury is proximately caused by the concurrent wrongful acts or omissions of two or more persons acting independently. That the negligence of another person than the defendant contributes, concurs, or co-operates to produce

the injury is of no consequence. Both are ordinarily liable. And unless **the damage** caused by each is clearly separable, permitting of distinct assignments of responsibility to each, each is liable for the entire damage. The degree of culpability is immaterial. And so when the injury is the result of the neglect to perform a common duty, **whether charged with joint or concurrent negligence all parties contributing to produce the injury by their responsible acts or omissions, may, at the option of the plaintiff be joined as defendants in the same action.**"

1 Sherman & Redfield Negligence, Sec. 122, pp. 317, 318, 319.

In a case in 242 Ill., 166; 89 N. E., 974, a stock yard company and a railroad were sued jointly by an employee of the railroad. Held: Several persons acting independently but causing together a single injury may be sued either jointly or severally, and the injured party may at his election sue any of them separately, or he may sue all or any number of them.

In Paducah Tr. Co. vs. Sine, 33 Ky. L., 792; 111 S. W., 356, plaintiff was a rear man on an ice delivery wagon. He was injured by a collision between the ice wagon and a street car, and sued the owner of the ice wagon and the street car company. Held, joint action properly brought.

In Sea Ins. Co. vs. Vicksburg, etc., Ry. Co., 159 Fed. 679, the following was held: "It is settled, seemingly, without dispute, that, if the concurrent **or successive negligence** of two persons result in an injury to a third person, he may recover damages of either or both, and neither can interpose the defense that the prior concurrent negligence of the other contributed to the injury."

In Clinger's Admrx. vs. C. & C. Ry., 33 Ky. L., 86; 109 S. W., 315. If an injury is inflicted by two or more wrongdoers an action may be maintained by the injured person either against one or against all of them, their liability being joint and several.

While several may be guilty of several distinct negligent acts, yet, if their concurrent effect is to produce an actionable injury, they are all liable therefor. The action not being to recover for the negligent act or acts but for the injury which they produce.

In McFadden vs. Met. St. Ry., 161 Mo., 652; 143 S. W., 884: A passenger was injured in a collision between a public automobile and a street car. Held, that the passenger may sue the owner of both, the negligence of each concurring in causing the accident. The cause of action was joint and several.

In Coleman vs. Minn. St. R. Co., 133 Minn., 364; 129 N. W., 762: An employe was being driven in a motor vehicle by his employer. He had a collision with a street car. Negligence was alleged in the employer and the street car company. Held, that he may sue both.

In each of these cases there was a different duty owed by each of the defendants.

A case clearly in point is that of Geise vs. Mercer Bott. Co., 87 N. J. L., 224, 94 Atl., 24, cited in Babbitt on Motor Vehicles, Sect. 1048, as follows:

Where a traction Company negligently leaves a rut besides its track, and a truck driver negligently runs into it and loses control of his vehicle, his employer and the traction company are jointly liable to a pedestrian injured.

THE GENERAL RULE THAT ALL PERSONS CAUSING INJURY BY THEIR JOINT OR CONCURRENT NEGLIGENCE MAY BE SUED IN ONE ACTION PREVAILS IN GEORGIA.

The general rule is of force in Georgia. Brooks vs. Ashburn, 9 Ga., 298 (3); Page vs. Citizens Banking Co., 111 Ga., 73; Mashburn vs. Dannenburg Co., 117 Ga., 580; Constitution of Georgia, Code Sec. 6541; Central Ry. vs. Brown, et al., 113 Ga., 414; Sou. Ry. vs. Grizzell, 124 Ga., 740; Cox vs. Strickland, 120 Ga., 104; Eining vs. Ga. Ry. Co., 133 Ga., 458 (2); Sou. Ry. vs. Cash, 131 Ga., 537; L. & N. R. R. vs. Roberts, 136 Ga., 270; VanSant vs. Sou. Ry., 135 Ga., 444; Sou. Ry. vs. Miller, 1 Ga. App., 616; Finlay vs. Sou. Ry., 5 Ga. App., 722; A. C. L. Ry. vs. Bryant, 7 Ga. App., 703; Sou. Ry. vs. Sewell, 18 Ga. App., 544.

The case of L. & N. R. R. vs. Roberts supra following So. Ry. vs. Miller supra has special and controlling significance. It was decided by a unanimous bench.

Ga. Code, Sec. 6207, is as follows:

"6207. DECISION OF, HOW REVERSED: A decision rendered by the Supreme Court prior to the first day of January, 1897, and concurred in by three judges or justices, cannot be reversed or materially changed except by the concurrence of at least five justices. Unanimous decisions rendered after said date by a full bench of six shall not be overruled or materially modified except with the concurrence of six justices, and then after argument had, in which the decision, by permission of the Court, is expressly questioned and reviewed; and after such argument, the Court in its decision shall state distinctly whether it affirms, reverses or changes such decision."

The decision in the case at bar was decided by only four justices, one being disqualified and one absent. So the L. & N. case supra which was not reviewed has force and effect equivalent to a statute. In that case a passenger sued a railroad company and three of its servants. The liability of the railroad company was of statutory origin. The liability of the servants was of common law origin. The company defendant by statute owed the passenger extraordinary care. The servant defendants owed him under the common law ordinary care.

The negligence charged against the engineer and fireman was that they failed to keep a proper lookout. The negligence charged against the section boss was that he failed to keep up the track.

The Court by a unanimous decision following the case of So. Ry. vs. Miller, 1 App., 220, and the same case 217 U. S., 209 held that there was no misjoinder and no separable controversy.

Such being the rule of practice in Georgia it is unnecessary for us to notice the text of Richey on Federal liability based upon decisions involving the local practice in Kentucky or the case of Taylor vs. So. Ry. 178 Fed., 380, which is opposed to the Pederson case as to what is interstate service and involved only the question of separable controversy and not of misjoinder.

From the foregoing cases it will be seen that no distinction is made by the Courts of Georgia between the case of a servant suing a master and servant, and a case between a servant and person occupying different relations, but in all cases the injured party may sue all persons whose acts concur in causing the injury.

The rule in Georgia is epitomized in the case of Sou. Ry. vs. Miller, 1 Ga. App., 621, where, after citing Alabama Great Sou. Ry. vs. Thompson, 200 U. S., 206; Ry. Co. vs. Dixon, 179 U. S., 131, it is said:

> "The proposition that the declaration contained a misjoinder of defendants because the liability of the railway company is statutory, and that of the other defendants is common law liability, we do not think is meritorious. **We do not think it makes any difference whether the liability of one defendant arises from statute and the other from common law.** The practical question to be decided is, is there a liability, and are the defendants all liable? And the particular source from which the liability of each defendant emanates cannot be material. **The Court's judgment is based on the liability of the defendant, whether sattutory or common law, either one or both.**" (Italics ours.)

The authority of this case cannot be questioned, as it was affirmed by this Court in Sou. Ry. vs. Miller, 217 U. S., 209, followed by the Supreme Court of Georgia in L. & N. R. R. vs. Roberts, 136 Ga., 270, and by the Court of Appeals of Georgia in Sewall vs. Sou. Ry., 18 Ga. App., 544.

BECAUSE PETITIONER WAS AN INTERSTATE EMPLOYEE THE COURT BELOW DENIED HIM THE PRIVILEGE IT ACCORDS TO OTHER LITIGANTS

It follows from the foregoing that if the petitioner had not been an interstate employe he might have brought his action against the respondents without challenge and that because he was an interstate employe he has been deprived of this privilege.

The record of this case illustrates with sharp emphasis the distinction made by respondents and the Court below between interstate and intrastate employes.

The first count of the complaint (p. 3 of the record) alleged petitioner and the carrier to have been engaged in interstate commerce, so that a cause of action was made out against the carrier under the Federal Liability Act and against the servant respondent under the common law. In the second count it is not alleged that the carrier was engaged in interstate commerce so that under the second count a cause of action was made out against the carrier under the State Liability Act and against the servant respondent under the common law.

Neither by demurrer nor plea was the second count attacked for misjoinder either of parties or actions, so that if the proof had shown him to have been engaged in intrastate commerce his recovery would have been sustained without a challenge from the respondents.

It necessarily follows that for the sole reason that he was an interstate employe petitioner has been denied privileges accorded to other persons, and this leads us to an examination of the reasons given by the Court for so doing.

THE CONCLUSION OF THE COURT BELOW THAT THE FEDERAL ACT IS SO FAR EXCLUSIVE AS TO SUSPEND THE COMMON LAW LIABILITIES BETWEEN THE SERVANTS OF AN INTERSTATE CARRIER IS ERRONEOUS.

The Court below seems to have evolved the theory that because plaintiff and both respondents were engaged in interstate commerce, the Federal Employers' Liability Act was so far exclusive as to suspend all laws relating to either of the three parties, so that the Federal Act is the sole measure of the rights of the interstate servant as to all persons engaged with him in interstate commerce.

We submit that the statute in question contains within its terms no justification for this position.

It is true that the statute does exclude the operation of all other laws as to liability of the carrier between itself and all its interstate employes, but it does not assume to affect the relations between the servants of the carrier inter se-se. Upon the contrary the duties and liabilities of the servants as between themselves remain the same as before.

At common law the servant was liable to third persons whether co-servants or strangers for any act of misfeasance. This rule governs the relation in Georgia. See Sou. Ry. vs. Miller, 1 Ga. App., 621, citing Osborne vs. Morgan, 130 Mass, 102, and Sou. Ry. vs. Grazzell, 124 Ga., 735-6. See also Sou. Ry. vs. Sewall, 18 Ga. App., 544, where the authorities are reviewed.

The effect of the judgment of the Court below is to destroy this right of action which one servant has against another who has wrongfully injured him, and to relieve an interstate servant from all duties and liabilities to the other servant of the master.

The error of the Court below in giving such construction to the statute is so obvious that it may be contended that the Court did not so decide, but such contention can have no valid foundation.

It is established by the Georgia decisions that petitioner could have sued the respondents jointly had he been an intrastate employe. **This is in effect conceded** by the fact that no objection of misjoinder was made to the second count of the complaint. It being true that the Georgia Courts permitted an intrastate employe to sue his carrier master and delinquent servant in the same action, and refused this privilege to an interstate empolye, because of the exclusiveness of the Federal statute, it necessarily follows that its

only justification for so holding is upon the theory that the statute nullifies all laws relating to servants as well as the carriers who are engaged in interstate commerce.

The Federal statute does not deal with questions of practice. It deals alone with the liability of the master to the servant, so that the question of exclusiveness could have no relation to the form of action or the questions of practice relating thereto. Roberts Federal Liabilities of Carriers, Art. 670, p. 1167, same author, Art. 688, p. 1197, same author, Art. 698, p. 1219, et seq.

In fact the questions propounded by the Court of Appeals and the answer of the Supreme Court indicate that both courts had in mind that the Federal statute alone could be looked to for the relations of any party, master or servant, engaged in interstate transportation.

The Court of Appeals propounded the following question:

> "May an employe of a railway company engaged in interstate commerce maintain a joint action against the company and its engineer under the Federal Employers' Liability Act of 1908 (U. S. Comp. St., 1916, 1657-8665), where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury by the plaintiff, and where also a violation of the safety appliance act of Congress (Sec. 8605, et seq.) is charged against the carrier?"

Note the significance of the use of the words "under the Federal Employers' Liability Act" in both question and answer.

The Supreme Court answered as follows:

> "An employe of a railway company engaged in interstate commerce cannot maintain a joint action against the

company and its engineer under the Federal Employers' Liability Act of 1908, where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury to the plaintiff. And this is true irrespective of any allegation as to a violation of the safety appliance act of Congress."

Note that the Court, page 63 of the record, based its conclusion upon the exclusiveness of the statute.

Under these considerations no other reasonable explanation can be given to the judgment of the Court below, based as it was upon the exclusiveness of the Federal Act, than that it deemed the Federal Act to be so far exclusive as to suspend the common-law liability of the respondent servant.

It cannot be claimed that the Court below was following a State practice: 1st. Because it gives only Federal reasons for its decision. 2d. The long line of authorities above cited contradicts such assertion. 3d. The fact that the second count of the petition which states facts calling into operation the State Employers' Liability Act as to the master respondent, and the common law as to the servant respondent was not challenged for misjoinder, either of parties or actions, attests the fact that the Federal grounds only were considered by the Court below.

THE POSITION OF RESPONDENTS IS ILLOGICAL IN THE EXTREME.

The crux of defendants contention is as follows (see p. 5 of their brief in opposition to the petition for writ of certiorari):

The State Court may not permit a joinder of a delinquent servant and a delinquent interstate master in one

action because a round verdict must be rendered and that this has the effect of creating a liability.

This is illogical in the extreme. The State has not by constitution or act of legislature fixed the measure of damages to an injured servant. Neither has Congress fixed such measure of damages. Both Congress and the State have left this to the common law. All that the State has done is to permit a plaintiff in one of its courts as was done at common law, to sue all tort feasors in the same action, and we submit that there is nothing in the Federal Employers Liability Act which deprives the injured servant of an interstate carrier of this right.

This is purely a question of practice, and this Court has in numerous decisions held that the statute deals alone with substantive rights and does not deal with questions of practice leaving those questions to the forum.

See Roberts on interstate employes supra and citations of cases thereunder, which includes Minneapolis R. R. vs. Bombolis, 241 U. S., 211.

It may be well to note in passing, that the requirement for a round verdict against trespassers is not derived from a statute, but is merely an application by the Courts of the rule of common law.

Georgia Code, Section 4512 (see appendix) which provides for apportionment, is the only statutory limitation, and it has been construed by the Georgia Courts to apply only to trespassers upon realty. See McCalla vs. Shaw, 72 Ga., 458, Hunter vs. Wakefield, 97 Ga., 543. Code Section 4513 (see appendix) does give the right of requiring contribution by one who has paid off the judgment, but the rule as to a round verdict in Georgia is derived solely from the common law and not by reason of any statute.

THE COURT BELOW ERRONEOUSLY CONSTRUED THE FEDERAL STATUTE BY CONFUSING THE CAUSE OF ACTION GIVEN TO AN INJURED EMPLOYEE WITH THAT GIVEN TO AN ADMINISTRATOR FOR THE HOMICIDE OF AN EMPLOYE.

If it be possible that we are mistaken as to its attitude, and that the Court below did not intend to hold that the Federal Act was so far exclusive as to suspend the common-law liability of the servant respondent to petitioner, then it necessarily follows that it made just as serious and palpable a misconstruction of the Federal Act by confusing the cause of action given by the statute to the administrator of a deceased employe in cases of homicide and the cause of action arising to an employe who has been injured, but not killed. This clearly appears from that portion of the opinion in which it cites the case of Western and Atlantic R. R. vs. Smith, 144 Ga., 737.

That was a case wherein parents of an **intrastate** servant sued the master carrier and another railroad for his homicide.

The Georgia Employers' Liability Act, Code Section 2782 (see appendix), gives a cause of action **to an injured employe against the carrier master,** and in case of his homicide to his parents, there being no administration.

Under the Georgia Homicide Act, Code Section 4424 (see appendix) the cause of action against the Western & Atlantic Railroad which was **not** the master, was in the mother alone.

Under these conditions the Court properly held there was a misjoinder of plaintiffs because the father had a right of action jointly with the mother only against the employer railroad, and no right of action against the other, while the

mother had a joint action with the father against the employer railroad and a sole right of action against the other railroad. For the same reason there was a misjoinder of defendants.

The citation of the case of W. & A. vs. Smith, indicates that the Court confused the cause of action given to the administrator in a case of homicide with a cause of action accruing to the employe in case of injury.

It is true that if petitioner had been killed and his administrator had sought to sue the carrier and servant respondents in the same action, there would have been a misjoinder of plaintiffs and defendants, just as there was in the case of W. & A. Railroad vs. Smith, because under the Federal Act in cases of homicide the administrator has the cause of action, while under the State Homicide Act (Code Section 4424, see appendix) which applies to the servant respondent, an administrator has no cause of action.

But in the present case the servant petitioner was injured, not killed.

Under the Federal Act he had a cause of action against the master and under the common law he had a cause of action against the servant. **In both cases the measure of damages was the same.** The Federal Act does not prescribe a measure of damage to an injured employe. It leaves that to be ascertained from the common law. The Federal Act does not prescribe the duty of the master to its servant. The act leaves that to the common law which prescribes that ordinary care shall be used not to injure the servant. So that the plaintiff had a cause of action against both respondents for a breach of the same duties flowing from each and the same measure of damages as to each.

It is clear that the Court below so far misconceived the Federal statute as to confuse the rule relating to a deceased employe with that relating to an injured employe.

Note that in the opinion (p. 63 of the record) the Court below said:

> "In the case of W. & A. R. R. vs. Smith, 144 Ga., 737, this Court decided that in a suit under the State law **An employe** (italics ours) of a railroad company could not join as defendants in the same action, the employer company and another railroad company."

This application of the cited case was wholly inaccurate, because the case of W. & A. R. R. vs. Smith was the case of the parents there being no administration, suing for a homicide of their son employe, while the case at bar is that of an injured employe suing for his injuries.

The cited case in stating the case it then had before it begain by saying:

> "A FATHER AND MOTHER (italics ours) instituted an action against two railroad companies for the homicide of their son * * * who had never been married, and **upon whose estate there was no administration.**"

It will be noted that the Georgia Act is identical with the Federal Act, except **that in case of homicide the beneficiaries may sue where no administrator has been appointed and the measure of recovery is prescribed.**

So it is evident that the Court below entirely misconceived the purpose of the Federal statute and evolved the conception that under its terms the same rule applied to an injured employe which applies to his homicide.

Such a conclusion is so illogical that it can hardly be believed that an appellate court could so far misconceive the plain terms of the statute, but necessarily it is true either that

the Court below came to the conclusion that the Federal statute was so far exclusive as to embrace within its terms all the rights of an injured servant against all parties, even suspending the common law liabilities of an offending co-servant, or that it is so far misconceived the purport of the Federal statute as to confuse the cause of action given to an administration of a deceased servant with the cause of action which inures to an injured servant.

THE CASE OF DOYLE VS. ST. PAUL R. R. IS WELL DECIDED AND CONTROLS THIS CASE.

We submit that the case of Doyle vs. St. Paul 159 N. W. 1081; 134 Minn., 461, contains the true rule. The Court there held in terms that there is no misjoinder where a plaintiff joins two defendants in one action, the liability of the one arising upon the Federal Employers' Liability Act and the other upon the common law.

The only difference between the Doyle case and the case at bar is that the master's co-defendant in the Doyle case was a corporation while in the case at bar the master's co-defendant was a servant who, like petitioner, was engaged in interstate commerce.

In both cases the injured servant had a cause of action against each of the defendants, the measure of damages as to each being that prescribed by the common law and the measure of the duty required by each being prescribed by the common law.

The Minnesota case is in accord with the long line of authorities hereinbefore cited, which hold that a plaintiff may proceed against all wrong-doers in one action.

ERRONEOUS CONCEPTION OF THE COURT BELOW AS TO THE IMPORT OF THE FEDERAL STATUTE.

The Court below in conclusion (see pp. 63 and 64 of the record) argues as follows:

> "A conclusion contrary to the one stated above, even if it could be reconciled with the Federal statute, would lead to confusion and injustice. Under our Civil Code, sec 4513, 'if judgment is entered jointly against several tresspassers and is paid off by one, the others shall be liable to him for contribution.' If the carrier and its engineer were jointly liable under the conditions stated in the second question a joint judgment would result against them, and they would be equally bound regardless of the fact that the duties imposed upon them are not the same. The jury would have no power in such a case to specify the particular damages to be recovered by each."

This we submit is an erroneous view of the duty of the court, an erroneous interpretation of the act, and affords no justification for the discrimination made against an interstate employee.

It is seen from the Miller case cited and quoted, page 12 hereof and the case of L. & N. R. R. vs. Roberts, 136 Ga. 270, and Sou. Ry. vs. Miller 217, U. S. 209, that these difficulties do not bar the right of an interstate employee to sue his master and any number of servants in the same action.

We submit that under the principles enounced by this Court in the case of Dickinson vs. Stiles, 246 U. S., 631, the Federal Statute only prescribes **the rule of conduct between master and servant leaving the consequences to be determined from the common law** and that the Georgia Courts disregarded these principles and their decisions are directly opposed to the decision of this Court in that case.

This being true, there can be no justification for the discrimination here declared against the interstate employee.

DIFFICULTIES IN DETERMINATION DO NOT JUSTIFY COURTS IN DECLINING JURISDICTION.

The courts cannot decline jurisdiction of a case because of the difficulties attending the trial. This Court in Mondou vs. N. Y., N. H. & H. R. R., 223 U. S. pp. 58 and 59, answering this argument said:

> "We are not disposed to believe that the exercise of jurisdiction by the State Courts will be attended by any appreciable inconvenience or confusion; but be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even although possessing some elements of similarity, as to where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employee or a stranger. But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases."

Besides the difficulties referred to are not such as are recognized by courts. It has always been held that the fact that various defendant tort feasors have different defenses is no objection to their joinder in the same suit. (See quotation from Powers vs. Chesapeake, p. 5 hereof.)

See also A. G. S. R. R. vs. Thompson, 200 U. S. 219, where it is said:

> "The fact that by answer the defendant may show liability is several, cannot change the character of the

> case made by plaintiff in his pleading so as to effect the right of removal."

See also Sou. Ry vs. Carson, 194 U. S. p. 139, where it is said:

> "A separate defense may defeat a joint recovery but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject matter of the controversy; and that for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings."

THAT COURTS MAY NOT APPORTION DAMAGE IS NO GROUND FOR REFUSING JURISDICTION, BECAUSE ALL COURTS (UNLESS REQUIRED BY STATUTE) REFUSE TO APPORTION DAMAGES AMONG TORT FEASORS.

Emphasis is laid by the Court below upon the fact that the jury has no power to specify the particular damages to be recovered of each defendant; but it gives no reason why this fact should operate against the interstate employee and not against other persons.

In the Miller case 217 U. S. 209, as well as other cases cited supra, the verdict was grounded against all defendants without reference to their degree of culpability, yet this Court as well as the Court below held that this fact furnished no cause for misjoinder, and we submit that the Federal statute affords no just cause for this discrimination against an interstate employee.

The fact that a jury cannot apportion, but must render a round verdict is the settled law as to all tort feasors whenever the same has not been changed by statute and affords no ground of misjoinder.

Sutherland on Damages Art. 263, pp. 1531-1532, states the proposition as follows:

> "In a joint action against several for trespass or other tort, if all are found guilty entire or joint damages must be assessed against them. All the legal consequences of being jointly guilty must necessarily follow, of which one is that each is liable for all the damages which the plaintiff has sustained without regard to different degrees or shades of guilt. The jury are to estimate the damages against all the defendants, if guilty, according to the amount which they think the most culpable of them should pay. It is irregular, in such a case, on finding those jointly charged jointly guilty to assess damages against them separately even though they severed in pleading."

In 28 Am. & Eng. Ency. of Law, p. 570, it is said that where wrong-doers are sued jointly, it is the universal rule that the verdict must be in one sum. It must be against all for the highest damage done by one.

In 38 Cyc. p. 492, it is said:

> "Damages may be assessed in a single sum. They cannot be apportioned by the jury among defendants, for the sole inquiry open is what damages plaintiff has sustained, not who ought to pay them. Discrimination according to the relative enormity of the acts of each is not permitted. Should the jury assess different amounts, plaintiff should have judgment against all convicted for the largest sum found against anyone of them, for where no punitive damages are claimed plaintiff is entitled to a joint verdict, for what the most culpable ought to pay."

We submit that the Court below made a wholly erroneous construction of the Federal Liability Act. Under that

act the measure of damages is that prescribed by the common law. The Act gives the right to recover damages, but leaves the measure of damages to be ascertained from the common law. As the action against the servant arose from the common law it follows that the measure of damage was the same as to both.

Likewise the Federal Act does not undertake to prescribe the duty of the carrier employee to its servant, but leaves the measure of duty to be ascertained from the common law; as the action against the servant arose from the common law it follows that the measure of his duty to the plaintiff was the same as the carrier.

So that the Court below was erroneous in its conclusion that there were different measures of damages and different duties from the respective defendants.

It is true that the Federal Act restricts the carriers defense of contributory negligence and assumption of risk, but these are purely defensive matters, and as seen from the cases of Chesapeake R. R. vs. Powers, 169 U. S. 92; Sou. Ry. vs. Carson, 194 U. S. 139; A. G. S. Ry. vs. Thompson, 200 U. S. 218, it is no cause of misjoinder that different defendants have different defenses.

The case of Sou. Ry. vs. Carson, 194 U. S. 136, controls this case.

In that case Carson brought his action against the carrier master and negligent servants. One of the specifications of negligence was that one of the automatic couplers "was not in proper condition which rendered it necessary for plaintiff to go between the cars to effect the coupling, and that the accident thereupon happened by reason of defendants' joint and concurrent negligence, carelessness, recklessness, etc., in particulars detailed."

In the Carson case under the Safety Appliance Act the carrier defendant was deprived of the defense of assumption of risk. The other defendants could make this defense. This Court held that the defendants were properly joined and that the parties defendant were deprived of no Federal right by reason of this joinder, and that this was true even though a round verdict was rendered and the master could not call on the servants for contribution.

For all the foregoing reasons we submit there is no justification for the interpreation placed upon the Federal Liaility Act by the Court below.

JURISDICTION OF THIS COURT.

In their brief resisting the petition for certiorari Respondents denied the jurisdiction of this Court. We assume that the grant of the certiorari adjudicates this question, but if that were not so we think the statement in he case of Andrews vs. Virginia Railroad, 248 U. S. 272, that a case arising under the Federal Employers' Liability Act is a case for certiorari is a sufficient reply to these contentions.

CONCLUSION.

We submit that an interstate employee has the right when injured to sue in State Courts upon the same equality as an intra-state servant and that the Court below deprived petitioner of a valuable Federal right in the discrimination practiced against him, and we submit that because of this error of the Court below, whose decision is in conflict with the practice of the Courts of Georgia and the principles of the common law, its judgment should be reversed.

WM. W. OSBORNE,
ALEXANDER A. LAWRENCE,
Attorneys for Plaintiff in Certiorari.

APPENDIX.

"2728. Injury by Co-employee. Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband or child, or children of such employee, **and if none then of such employee's parents,** and if none then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defects or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves or other equipment; PROVIDED, nevertheless, no recovery shall be had hereunder if the person killed or injured brought about his death or injury by his own carelessness amounting to a failure to exercise ordinary care; or if he, by the exercise of ordinary care could have avoided the consequences of the defendant's negligence. The measure of damage shall be prescribed in section 4424 and 4425; PROVIDED, that the party or parties for whose benefit recovery may be had under this and the five succeeding sections **may sue and recover in their own name or names in the manner precsribed by section 4424, in case no administration or executor has been appointed at the time suit is filed.** In case death results from injury to the employee, the employer shall be liable unless it makes it appear that it, its agents and employees have exercised all ordinary and reasonable care and diligence, the presumption being in all cases against the employer. If death does not result from the injury, the presumption of negligence shall be and remain as now provided by law in case of injury received by an employee in the service of a railroad company." (Italics ours.)

This section was codified from Georgia Acts 1909, p. 100. The balance of the Georgia Statute as codified is a substantial copy of the Federal Employers' Liability Act.

"4424. Recovery of Homicide When. A widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent, and if suit be brought by the widow or children, and the former or one of the latter dies pending the action, the same shall survive in the first case to the children, and in the latter to the surviving child or children. The husband may recover for the homicide of his wife, and if she leaves child or children surviving, said husband and children shall sue jointly, and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action. **A mother,** or, if no mother, a father, may recover for the homicide of a child minor or sui juris, upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband or child. Said mother or father shall be entitled to recover the full value of the life of said child." (Italics ours.)

"4512. Against Joint Trespassers. Where several trespassers are sued jointly, the plaintiff may recover, against all, damages for the greatest injury done by either. But the jury may, in their verdict, specify the particular damages to be recovered of each, and judgment in such case must be entered severally.

"4513. Contribution. If judgment is entered jointly against several trespassers, and is paid by one, the others shall be liable to him for contribution."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 150.

B. C. LEE, PETITIONER,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

SUPPLEMENTAL BRIEF OF COUNSEL FOR PETITIONER.

To inform the Court as to certain statements and conclusions contained in the respondents' brief, we think it appropriate to reply thereto.

On page 7 of their brief, respondents' counsel, quoting section 4512, Code of Georgia, said: "The plaintiff bases his claim to a joint right of action and to a joint judgment against the railroad company and O'Donnell, its engineer, on the Georgia statute."

This is a wholly inaccurate statement, so far as the claim to a joint right of action is concerned. Petitioner did not de-

rive his right to sue the respondents from this statute. This statute does not create such a right. Its purpose and scope is simply, in the first sentence, to declare the common law, and, in the second, to soften the rigor of the common law by permitting the jury to make an apportionment of damages. It recognizes the right to sue jointly, but does not create it. This right was derived by the adoption by the Georgia courts of the common-law rule that all wrongdoers may be sued in one action, that the injured party may sue them separately or collectively, as he may elect. This rule was announced by the Georgia courts in the early case of Brooks *vs.* Ashburn, 9th Georgia, 228 (3), long before the code was adopted, and has existed unimpaired ever since, as will be seen from the cases cited on page 10 of our original brief, and the case of Central Railroad *vs.* Harden, 18th Georgia Appeals, 392.

We challenge the assertion made on page 19 of counsel's brief that the record does not bear out the statements made, that the complaint of misjoinder was not made as to the count of the petition brought under the State liability act.

It is true that each demurrer does make the general ground that there is a misjoinder of parties. This, under our practice, would not raise the question, because it is necessary, we think, to point out the respect in which the misjoinder is made and of what it consists. However, note the amendments to the demurrer, pages 4-5 of the record, where, alone, the first count is excepted to. Note that the answers, pages 7 and 8 of the record, answer both counts. Note further, that the amendments to the answer, pages 9, 10 and 11 of the record, in which is set up the defense of misjoinder, sets it up to the first count alone. There was no abandonment of the second count up to this time. The Court passed upon each ground of demurrer to both counts. (See p. 47 of the record.) It was only at the filing of the amended answer, long after the demurrers were overruled, that the defendants admitted they were engaged in interstate commerce, and it

was only upon the trial of the case that the second count was abandoned.

We submit that this record justifies our assertion that had the parties being engaged in intrastate commerce the petitioner's right to sue jointly would not have been challenged.

Cases cited by respondents' counsel as authority for holding that defendants cannot be joined in one action, where liability of one arises under the common law and the other arises under a statute, do not bear out the respondents' position. Counsel cite Thompson *vs.* C. & O. Ry., 176 S. W., 1006. An examination of this case and the cases of South Covington *vs.* Finans, 155 S. W., 742, and L. & N. R. R. *vs.* Strange, 161 S. W., 239, shows that the Thompson case was based upon a local rule in Kentucky to the effect that causes of action in the courts of Kentucky cannot be joined where one cause arises by statute and the other from the common law.

The case of Kelly *vs.* C. & O. Ry. was simply the case of a Federal court sitting in Kentucky following the local practice, except that the question of separable controversy was alone involved.

This case is entirely out of harmony with Southern Ry. *vs.* Miller, 217 U. S., 209, where it was held that no separable controversy existed, though the cause of action against the individual defendants arose by common law and the liability of the railroad company by statute.

The textbook authorities cited are based upon these cases. Consequently, their only value is to expound the local practice of the State of Kentucky.

The case of Taylor *vs.* Southern Ry., 178 Federal, 380-1, besides being poorly considered, as it was exactly contrary to the Pederson case, wherein it was held by this Court that an employee engaged in the repair of a railroad bed used for interstate traffic was engaged in interstate commerce, involved only the issue of separable controversy and not the

issue of misjoinder, and the Court held that there was no separable controversy in that case.

It is stated on page 24 of respondents' brief that while it is conceded that the Georgia courts in common with other courts have often upheld the joint right of action against tort-feasors it is denied that the Supreme Court of the State has ever held that the employee may join the master and co-employees as defendants where injuries arose under either the Federal or State employers' liability acts. It is true that the Supreme Court has not passed expressly upon such a case since the present act was passed. Such cases have been before it, but the case at bar is, so far as the published reports show, the only one in which the point has ever been made. The cases of Washington *vs.* Atlantic Coast Line R. R., 137 Georgia, 638; Chandler *vs.* Atlantic Coast Line R. R., decided and reported together, were such cases. In each case the employee was injured in intrastate commerce governed by the present employers' liability act. The master and servant were joined as defendants in the same suit. The cases were litigated to a conclusion. In the Washington case no point as to the right of joinder was made. We cannot state for a fact, but we are quite sure, that in the Chandler case the point was made and decided adversely to the respondents by the Court of Appeals to whom the case was returned after the Supreme Court passed upon the constitutionality of the question. The opinion of the Court of Appeals is published in the 11th Georgia Appeals, but the facts are not set out, so we cannot with confidence state that the question was involved in this.

But we submit the case has been often passed upon and by our appellate courts in connection with railroad liability act in effect prior to the enactment of the present act of 1899. We will, for example, take the Miller case, 1 Georgia Appeals 616. First, for the reason that counsel state on page 25 of his brief that it would have been differently decided if the Federal law had been in existence at the time and the action

against the defendants had been founded thereon. Second because the Supreme Court of Georgia in deciding a similar question in L. & N. R. R. Co. *vs.* Roberts, 136 Georgia, 270 made the Miller case its decision by following it as an authority, and because this Court, 217 U. S., 209, affirmed it.

What was the law of Georgia at the time of the occurrence upon which it was based?

It was contained in sections 2320, 2321 and 2323 of the code of 1895, respectively, as follows:

> "Injury to Person or Property.—In all cases where the person or property of an individual may be injured, or such property destroyed, by the carelessness, negligence, or improper conduct of any railroad company, or officer, agent, or employee of such company, in or by the running of the cars or engines of the same, such company shall be liable to pay damages for the same to any one whose property or person may be so injured or destroyed, notwithstanding any by-laws, rules, or regulations, or notice which may be made, passed, or given by such company, limiting its liability.
>
> "(Sec. 2321.) Damages by Running of Cars, etc.—A railroad company shall be liable for any damage done to persons, stock or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.
>
> "(Sec. 2323.)—If a person injured is himself an employee of the company, and the damage was caused by another employee and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."

These sections were codified from the Georgia Acts of 1855-6, page 155. This was an employers' liability act to all intents and purposes just as much as the act of 1909,

contained in the present code section copied in the appendix on page 38 of our brief.

These statutes form a complete employers' liability act so far as persons injured by the running of trains is concerned. The company is made liable for the negligent acts of servants and agents. The presumption of negligence was created and the fellow-servant law was abolished. The Federal act of 1908 and the State act of 1909 went no further, except that they applied to employees other than those engaged in the operation of trains.

Under these conditions we insist that the impartial mind must consider that there is no justification for the statement that the Miller case would have been decided differently if the fellow-servant acts had been enacted previous to the occurrence which brought about the Miller case. The seeming difficulties of application which present themseves now presented themselves then. Against the servant defendant no presumption of negligence arose, but plaintiff had to prove negligence. In his favor, however, he could set up the defence of comparative negligence and to have his damages reduced. Against the railroad company defendant a presumption of negligence arose upon proof that plaintiff was without fault, but it could not have any diminution of damages by reason of the concurrent negligence of the plaintiff. These considerations which were merely defensive matters were not so difficult as to prevent the plaintiff from exercising his common-law right to sue both master and servant in the same action. Why should they prevent him now? No rational reason can be given.

We submit that the contention that a decision which declares that a plaintiff may join two defendants in the same action when the liability of one arises by statute and the other under the common law does not in principle govern and control the case of a statute simply because it is called an employers' liability act, is wholly without merit.

In criticising the Miller case, 217 U. S., 209, page 25 of respondents' brief, it is said:

> "Counsel for plaintiff have ignored the controlling question which arose in the case at bar, namely: How can the exclusive control of Congress over such liability exist if a State may by authority of its local statutes impose a joint liability upon and authorize a single joint judgment against the interstate carriers and others as joint tort-feasors and provide for contribution between the co-defendants?"

The reply to this "controlling" question is simple. Congress did not in the employers' liability act prescribe the measure of damages. It did not prescribe a rule of liability, but left the rules of practice to the courts of the several forums and the measure of damages to the rules of the common law. Under the common law a round verdict was required. Whether the Georgia rule is derived from statute or the common law is immaterial. If from a statute it is immaterial, for the statute follows the common law. (Respondents cannot complain of the contribution feature because their principal criticism of the Doyle case (page 27 of their brief) is that it is not applicable to this case because juries in Minnesota courts were allowed to return verdicts in different amounts against the different defendants.) It may be of interest here to note that code of Georgia was prepared under the act of December 9th, 1858, which provided for commissioners to prepare for the people of Georgia a code which should "as nearly as practicable embrace in a condensed form the laws of Georgia, whether derived from the common law, the constitution, the statutes of the State, the decisions of the Supreme Court, or the statutes of England in force in this State."

It is a known fact that the commissioners in the exercise of their powers took the liberty of interpolating some of the provisions of the civil law and some of their views as to proper changes of the common law. This probably accounts

for the provision for contribution among tort-feasors, and the apportionment of verdicts in cases of trespass to land, as the sections in question were incorporated from the common law. (See Simpson *vs.* Perry, 9th Georgia, 508-509. Chattahoochee Brick Co., 92 Georgia, 631.)

It is inconceivable that Congress could by the employers' liability act have intended to deprive an interstate employee of his common-law right to a round verdict or his common-law right to join master and servant as defendants. The act was destined to help an employee, not to injure him. It was intended to add to his rights, not to detract from them.

Why should the interstate master have rights superior to other mas ers? Why should this Court be asked to deny an interstate servant his common-law right to a round verdict when it sustained it as to the plaintiff in the case of Washington Gas Light Co. *vs.* Lowden, 172 U. S., 534-552? The answer is that Congress did not so intend.

In various parts of respondents' brief it is urged as against the right of joinder in this case that the rules of law applicable to the safety-appliance act and the law as to contributory negligence applied differently as between the two defendants. Replying, we say that if separate defences will defeat the right of joinder then the cases of Powers *vs.* Chesapeake R. R., 169 U. S., 92; Southern Ry. *vs.* Carson, 194 U. S., 136, and the long line of decisions of this Court in accord therewith must be disregarded, for it has never been held that the fact that several wrongdoers had several defences deprived the injured party from suing them jointly. In the last-named case there was a defective safety appliance which cut off defences from the company which remained to the servants.

In respondents' brief some play is made upon the words "joint negligence." From the authorities, especially Sherman & Redfield, quoted on pages 7 and 8 of our brief, it is immaterial to the right of joinder whether the negligence is joint or concurrent, but it is well to note in passing that the

negligence in this case was both joint and concurrent. The act of the engineer caused injury. This was the act of both himself and the company, and while the company furnished a defective safety appliance, by the amendment, pages 8 and 9 of the record, it was shown that the engineer knew that petitioner was between the cars and that the coupling was defective.

The final and concluding argument of respondents is that in this case as a matter of practice the "decision of the highest court of the State that the defendants could not be sued jointly as tort-feasors in the said court is conclusive of the question."

Replying to this proposition, we have to say that the decisions cited on page 10 of our brief, together with the Miller case, cited on page 12 of our brief and accepted by this Court as the practice in Georgia, established the fact that under the Georgia practice such joinder has been adjudicated to be allowable. From the Georgia statute on page 10 of our brief it is shown that this rule of practice cannot be changed except by direct review, and the concurrence of the six justices. It follows from this that the Supreme Court of Georgia could not have intended to change the rule of practice, for it did not pretend to review its former decisions, and as only four justices participated in the decision it could not, as a physical fact, have had such effect. To say that the Supreme Court of Georgia bases its decision in this case upon a rule of practice of the courts of the State of Georgia is tantamount to saying that that Court set up a sham rule of practice as a sham to prevent this Court from reviewing its decisions. For its rule had been so well established that a decision contrary to this must have been a sham, and it is unthinkable that the justices of a court of the history and traditions of that high court could countenance a sham to avoid a review of its decision.

It is established by the case of Southern Ry. *vs.* Miller, 1 Georgia Appeals, 621, affirmed by this Court in 217 U. S.,

209, and adopted and followed by the Supreme Court of Georgia in L. & N. *vs.* Roberts, 136 U. S., 270, that a plaintiff may in one action join a master and servant wrongdoer where the liability of the one arises upon a State statute and the other upon the common law. Such being the settled rule of practice, how can it be said that the same rule does not apply when the cause of action arises under the Federal law? To say so discriminates against the servant having an action under the Federal statute. This the court below did, and this we say was error.

We submit that the Supreme Court of Georgia could not formulate a rule applicable alone to cases arising under the federal employers' act. That act leaves it to the State courts to enforce it under their rules of practice. It does not authorize these courts to establish a rule of practice peculiar to such actions alone. The courts must enforce the statute according to their established rules of practice, so if the courts below have sought to establish a rule of practice to meet its views as to this particular case the practice is discriminatory and an error and should be reversed.

Respectfully submitted,

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A. A. LAWRENCE,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. 150

B. C. LEE, *Petitioner,*

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY, ET AL,
Respondents.

BRIEF FOR THE RESPONDENTS

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SYNOPSIS

TABLE OF CASES

TABLE OF CASES—Continued

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. 150

B. C. LEE, *Petitioner,*

vs.

ENTRAL OF GEORGIA RAILWAY COMPANY, ET AL,
Respondents.

BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

The Court of Appeals of Georgia, under instructions om the Supreme Court of the State, held that an action der the Federal Employers' Liability Act against the ilway Company and under the State law against O'Don-ll, as joint tort feasors, could not be maintained because misjoinder of defendants and of causes of action. A writ certiorari has been granted by this Court to review that dgment. See Record, pp. 62, 64; 147 Ga., 428; 21 Ga. pp., 558.

The evident purpose of plaintiff in joining O'Donnell as co-defendant was to avoid the trial of his case in the unty where the injury was received. Under the law of orgia, the venue of an action for personal injuries against railroad company as sole defendant is in the county where

the accident occurred, a judgment in any other county is void; but where the railroad is sued as a joint trespasser, a joint action may be brought and a joint judgment obtained in the county where a co-defendant resides.

(Civil Code of Ga. (1910), Secs. 2798 and 6541.)

The plaintiff was injured while coupling cars at Wadley, in Jefferson County, Georgia. O'Donnell, the engineer of the train, resided in Savannah, and plaintiff therefore brought in the City Court of Savannah, in Chatham County, Georgia, a joint action against the railway company and the engineer as co-defendant tort feasors. The railway company was charged with violating the Safety Appliance Act of Congress, in that the cars would not couple automatically; while the engineer, it was alleged, negligently moved the cars while plaintiff was adjusting the couplers. The action as originally filed was in two counts, the first count alleging that plaintiff was employed by the railway company in interstate commerce, and the second count omitting that allegation. The second count was abandoned by plaintiff when the defendants admitted by their amended answers that the injury occurred in interstate commerce. The case was tried solely upon the first count, which set forth a cause of action as against the railway company under the Federal Employers' Liability Act with the Safety Appliance Act of Congress, and as against O'Donnell, the engineer, under the law of Georgia. Each of the defendants demurred to the petition on the ground that there was a misjoinder of defendants and of causes of action. The trial court overruled this demurrer and there was a verdict for the plaintiff which was set aside on motion for new trial by defendants; a second verdict for plaintiff was likewise set aside by the trial judge. When the case reached the State Court of Appeals, that court, after hearing argument, certified to the Supreme Court of Georgia for decision and instruction the question of misjoinder of defendants and of causes of action which

was presented by the demurrers. The Supreme Court of the State held that the railway company and the engineer could not be sued as joint defendants under the Federal Employers' Liability Act. It also held that such joinder of defendants was not permissible in Georgia "even if it could be reconciled with the Federal Statute" because it "would lead to confusion and injustice," and because "the rules of law applicable to the several defendants are not the same." (147 Ga., 428, 431, Record, p. 63). The Court of Appeals, being so instructed, adopted the opinion of the Supreme Court of the State as it was in law bound to do, and reversed the judgment of the court below "because the court erred in overruling the defendants' demurrers setting up a misjoinder of parties defendant and a misjoinder of causes of action," and in disallowing amendments to defendants' pleas setting up such misjoinder. (Record, pp. 64, 69).

When the case was remitted to the trial court, an order was accordingly entered allowing plaintiff a stated time within which to amend so as to avoid the misjoinder (Record p. 73). Plaintiff declined to amend, insisting upon a joint action, and the petition was dismissed upon demurrer.

I.

THE DECISION OF THE SUPREME COURT OF GEORGIA, THAT A JOINT ACTION AGAINST THE RAILWAY COMPANY AND THE ENGINEER AS CO-TRESPASSERS COULD NOT BE MAINTAINED, WAS CLEARLY RIGHT.

(1) A joint liability of defendants is inconsistent with the scope and purpose of the Federal Employers' Liability Act.

The supremacy and exclusive character of this Federal Act in cases to which it applies is illustrated by many recent decisions of this Court. It stands decided that Congress by this Act "has taken complete charge of the subject matter

of the liability of common carriers by railroads engaged in interstate commerce to their employes injured or killed while employed in such service"; that the Act of Congress "is paramount and supersedes all State legislation or control regarding such liability"; that it is "exclusive in its operation, not merely cumulative"; and that the liability which it creates "cannot be supplemented or pieced out by the common or statute laws of the States."

> Michigan Central R. R. vs. Vreeland, 227 U. S., 59.
> S. A. L. Ry. vs. Horton, 233 U. S., 492.
> Wabash R. R. vs. Hayes, 234 U. S., 86.
> S. A. L. Ry. vs. Kenney, 240 U. S., 489.

In a recent case this Court said:

> "The liabilities and obligations of interstate railroad carriers to make compensation for personal injuries suffered by their employes while engaged in interstate commerce are regulated both inclusively and exclusively by the Federal Employers' Liability Act; Congress having thus fully covered the subject, no room exists for State regulation, even in respect of injuries occurring without fault as to which the Federal Act provides no remedy."

> N. Y. Cent. R. R. Co. vs. Winfield, 244 U. S., 147.

In another late case it was said:

> "Congress having declared when, how far, and to whom carriers should be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the State."

> New York Central R. R. vs. Tonsellito, 244 U. S., 360, 362.

The plaintiff does not contend that the State Court refused to apply the Federal Act in his suit. His only complaint is that the Court declined to allow him to obtain **a joint judgment** against the railway company and the individual defendant in one action against both as joint trespassers. Plaintiff was accorded the privilege of amending his petition so as to avoid the misjoinder of parties and causes of action, but he refused to amend and insisted upon a single judgment against both defendants as joint tort feasors. (Record, pp. 69, 73).

The essential purpose of a single action against several joint tort feasors is to recover one judgment against all for the whole damage, regardless of the culpability or degree of negligence of the several defendants. The damages cannot be apportioned between the defendants but must be assessed in a single sum, for the sole inquiry open in such cases is what damages the plaintiff has sustained **not who ought to pay them.**

> "Damages may be assessed in a single sum; they cannot be apportioned by the jury among the defendants, for the sole inquiry open is what damages plaintiff has sustained not who ought to pay them. Discrimination, according to the relative enormity of the acts of each, is not permitted."
>
> 38 Cyc., p. 492.
> Halsey vs. Woodruff, 9 Pick., 555.

"The rule is, in an action for joint tort against several defendants that the jury are to assess damages against all the defendants **jointly,** according to the

amount which in their judgment the most culpable of the defendants ought to pay. 2 Greenleaf's Evid., Sec. 277."

Simpson vs. Perry, 9 Ga., 508, 509.

"Those of the wrong doers who are sued together and found guilty in an action of tort are liable for the whole injury to plaintiff, without examining the question of the different degrees of culpability. As between themselves there is no contribution among several tort feasors. A verdict might, therefore, be rendered against two defendants and collected out of one, and he would have no right of contribution."

Washington Gas Light Company vs. Lansden, 172 U. S., 534, 552.

The Federal Employers' Liability Act gives a right of action to the interstate employe only for negligence of the employer (S. A. L. Ry. vs. Horton, 233 U. S., 492). The third section of the act provides that if the employe has been guilty of any contributory negligence the damages shall be diminished "in proportion to the amount of negligence attributable to such employe." Construing that section this Court holds that it requires damages awarded to the employe to be diminished in the proportion which his negligence bears to the combined negligence of himself and the defendant:

"We say this because the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employe' means, and can only mean, that, where the casual negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional

amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; * * *"

N. & W. Ry. vs. Earnest, 229 U. S. 114, 122.

Manifestly the object of the Federal Act cannot be accomplished in a joint proceeding against the employer and other tort feasors where "the sole inquiry open is what damages the plaintiff has sustained, not who ought to pay"; and where there can be no comparison of negligence exclusively between the employer and employe.

The plaintiff bases his claim to a joint right of action and to a joint judgment against the railway company and O'Donnell, its engineer, on the Georgia Statute, which provides:

"Where several trespassers are sued jointly, the plaintiff may recover against all damages for the greatest injury done by either. But the jury may, in their verdict, specify the particular damages to be recovered of each, and judgment in such case must be entered severally."

Civil Code of Ga. (1910), Sec. 4512.

(Note:—The last sentence in the foregoing section of the Georgia Code does not apply to personal torts, but only to trespass upon property. Therefore, in the case at bar, the jury could not assess damages against the defendants in different amounts. Hay, et al. vs. Collins, 118 Ga., 243 (4); Lee vs. Central Ry, et al., 147 Ga., 428, 431).

In the Winfield case this Court stated that "there are weighty considerations why the controlling law should be uniform and not change at every state line," and pointed out that the intention of Congress was "to

withdraw all injuries to railroad employes in interstate commerce from the operation of varying State laws and to apply to them a national law having uniform operation throughout all the States."

New York Central R. R. vs. Winfield, supra.

Having in view the effect and operation of the Federal Employers' Liability Act and its object and purpose as declared in numerous decisions of this Court, it is certain the Supreme Court of Georgia correctly answered the question submitted by the State Court of Appeals that there could not be a joinder of the defendants in this case. It is evident that if the statutes of a State could be thus invoked to create a **joint liability** against several defendants in a case arising under the Federal Act, then the exclusive right to regulate the liability of an interstate employer to its employes, which Congress intended by the passage of the Act, would be wholly lost. In actions against the interstate employer and other joint defendants the regulation as well as the measure of such liability would be absolutely controlled by the various State statutes, because the liability of joint tort feasors is measured and regulated by State laws which in Georgia, as in most of the States, provide that each joint trespasser defendant may be held liable for the greatest injury done by the most culpable.

The attempted joinder of the defendant in this action is based on the statute of the State which authorizes suits against joint trespassers. If the Court below had upheld the plaintiff's contention regarding the joinder of defendants, it would in a very effective manner have subordinated the Federal Act to the State law. It is clear that if a State may authorize a suit against a common carrier by railroad subject to this Act as one of several joint tort feasors, and provide for and fix the liability of the joint defendants **inter sese,** as the Georgia statutes do (Secs. 4512, 4513, Code

of Georgia of 1910), then necessarily the liability of the railway company will be measured by the terms of the State law and not by the Act of Congress, for the liability of one is the liability of all the others against whom the verdict is rendered. That portion of this Georgia statute which authorizes the jury to specify the particular damage to be recovered of each defendant does not apply to personal torts. The jury trying the case at bar could not apportion damages between the defendants, but were required to return a verdict for one amount jointly against both defendants. A joint judgment based upon a single verdict against defendants as joint tort feasors is necessarily a judgment under the common or statute law of the State. It is the State law, not the Federal Act, that provides for and fixes the joint liability of the defendants in actions against joint trespassers, renders each one liable for the damages done by all who are found guilty in any degree, and provides for contribution among the several defendants. To permit a recovery upon the joinder of a railroad with other defendants as joint tort feasors in cases to which the Federal Act applies would effectually nullify the declared purpose of this Act of Congress, which was to establish an exclusive remedy for the employe, and a uniform rule of liability for the employer; and would instead permit as many different remedies and rules of liability and contribution as the separate State legislatures might enact to cover suits against joint trespassers.

In the case of Seaboard Air Line Railway vs. Horton, 233 U. S., 492, it was held that the State legislature had no power to determine the effect of contributory negligence or assumption of risk in cases under the Federal Act, "since this would, in effect, relegate to State control two of the essential factors that determine the responsibility of the employer." If a State may not control any of the essential factors that determine the responsibility of the employer,

assuredly it may not control the entire result as it would do if it could authorize an action against the interstate employer as one of several joint tort feasors, permit the plaintiff to recover against all damages for the greatest injury done by either, and fix the amount of contribution among the several tort feasors.

It is manifest that if it be legal to join as a tort feasor with the employer one of the co-employes of the plaintiff, it would be legal to join any one or more third persons, either individuals or corporations, whose concurrent negligence contributed to the injury. It is also manifest that if the Georgia statute can be applied to such cases, and the Federal employer made liable for the greatest injury done by any of its co-defendants, different rules of liability may be established under the statutes of the several States. It is not difficult to imagine the many "factors" arising out of State laws which would in such procedure determine the right of the employe and measure the liability of the interstate employer. The declared purpose of the Act would by this means be entirely destroyed. It is certain that the terms of the Federal Act do not authorize such joinder of defendants, and its object and purpose exclude any implication that it may be done.

If the interstate employer, under the Federal Employers' Liability Act, may be regarded as a joint tort feasor and subject to the legal incidents which ordinarily attach to that status, many questions controlling the final liability of the employer and the rights of the employe will of necessity be removed from the influence of the National Statute and remitted to State legislation and decision. Under the common law a release to one joint tort feasor is a release to all, but this rule may be varied by statute in the several States. In some States an unsatisfied judgment against one joint trespasser would bar an action against the other tort feasors. (Hunt vs. Bates, 7 R. I., 217; Wilkes vs. Jackson, 2 H. & M.,

355), while elsewhere it would not have that effect (Lovejoy vs. Murray, 3 Wall., 1). In some jurisdictions exemplary or vindictive damages might be found against all joint tort feasors, (Reizenstein vs. Clark, 104 Ia., 287; Railway Company vs. Bohon, 200 U. S., 221, 223), while in others such damages would not be allowed. In brief, the inevitable result of subjecting the interstate employer as one of several joint tort feasors would be to submit the liability of such employers and the rights of their employes to the diverse action of numerous State courts, whereas Congress plainly intended that there should be one uniform rule of liability in all the States.

> "A Federal Statute of this character will supplant the numerous State Statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employers' liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all the States."
>
> Report of Judiciary Committee of House on Federal Employers' Liability Act of 1908.
> New York Central R. R. Co. vs. Winfield, 244 U. S., 147, 150.

This court has said that "a State has an unquestionable right by its constitution and laws to regulate actions for negligence" and to provide that a "plaintiff may proceed jointly or severally against those liable," (C. N. O. & T. P. Ry. vs. Bohon, 200 U. S., 221, 226). It is not apparent how uniform liability of the interstate employer could be accomplished under this well recognized prerogative where some States grant and others deny the right to join the employer with others as joint tort feasor defendants.

The State practice and procedure determines when and how tort feasors may be sued jointly in the State courts;

the liability of co-trespassers as between themselves depends upon the statutes and decisions of the States; and each State decides for itself whether, and under what circumstances, there may be contribution among tort feasors. If the interstate employer is subject to suit as a joint trespasser under State laws, then such employer may be required, by State legislation, to reimburse in whole or in part a co-defendant who has satisfied a joint judgment. The Georgia law, for instance, provides:

> "If judgment is entered jointly against several trespassers, and is paid off by one, the others shall be liable to him for contribution."
>
> Civil Code of Georgia of 1910, Sec. 4513.
>
> "In case of joint, or of joint and several, or of several liabilities of two or more persons, where all are equally bound to bear the common burden, and one has paid more than his share, he is entitled to contribution from the others; and whenever the circumstances are such than an action at law will not give a complete remedy, equity may entertain jurisdiction."
>
> Ibid., Sec. 4588.

These rules of contribution under the Georgia Statutes have been thus construed by the State Supreme Court:

> "At common law, joint trespassers were not liable for contribution to each other. This rule was changed by our Code. See Secs. 3075, 3076 [now 4512, 4513]. It must be remembered, however, that in making joint trespassers liable for contribution, the principle of contribution as stated in Section 3132 [now 4588] of the Code (though that section is not expressly applicable to suits founded on torts), is to be observed. That prin-

ciple is, that where all are equally bound to bear the common burden, and one has paid more than his share, he is entitled to contribution from the others; but where, as among themselves, one should bear a less portion of the burden than the others, he should be subjected to no more than his fair share; and where, as to his co-defendants, one should bear no portion of the burden at all, he should, as to them, contribute nothing."

Chattahoochee Brick Co. vs. Braswell, 92 Ga., 631, 633.

The question naturally arises, what law, State or National, would determine the ultimate responsibility of the interstate employer to its employe, sued as a joint tort feasor, where the particular portion of the joint burden each co-defendant must bear, as between themselves, is subject to regulation by State legislation and decision? The question is easily answered. There is no room for doubt that an interstate employer, as a co-defendant, could be compelled to contribute its "fair share"—or any other proportion—of the whole burden, **as measured by the State law,** if such employer may in fact be joined as a joint tort feasor as contended by the plaintiff in the case at bar.

The State Supreme Court, in denying the right to join the defendants in the case at bar, said:

"A conclusion contrary to the one stated above, even if it could be reconciled with the Federal statute, would lead to confusion and injustice. Under our Civil Code, Sec. 4513, 'if judgment is entered jointly against several trespassers and is paid off by one, the others shall be liable to him for contribution.' If the carrier and its engineer were jointly liable under the conditions stated in the second question, a joint judgment would result against them, and they would be equally bound, regard-

> less of the fact that the duties imposed upon them are not the same. The jury would have no power in such a case to specify the particular damages to be recovered of each, since Civil Code, Sec. 4512 is not applicable to personal torts. McCalla vs. Shaw, 72 Ga., 458; Cox vs. Strickland, 120 Ga., 104." (Record, pp. 63 and 64).

The "confusion and injustice" of a joint action of this character may be further illustrated by considering the measure of damages recoverable under the Federal Act and the recovery allowed by the State law. In homicide cases under the Federal Act, where there is no conscious pain and suffering, damages are limited to the "actual pecuniary loss" sustained by the beneficiaries. (M. C. R.R. vs. Vreeland, 227 U. S., 59; G. C. & S. F. Ry. vs. McGinnis, 228 U. S., 173; N. & W. Ry. vs. Holbrook, 235 U. S., 625). Under the Georgia homicide statute the measure of damages is "the full value of the life of the deceased without deduction for necessary or other personal expenses of the deceased had he lived." (Georgia Civil Code of 1910, Secs. 4424, 4425 and 2782). In some States compensation in homicide cases may be awarded for grief and mental suffering. (Brown vs. So. Ry., 65 S. C., 260). In others punitive damages may be recovered when the act is wilful and the negligence is gross. (C. N. O. & T. P. Ry. vs. Bohon, 200 U. S., 221, 223, quoting Kentucky homicide statute). If an action for homicide against several tort feasors, including an interstate employer, proceeds to a joint judgment in one sum against all, not only would there be "injustice and confusion" but it would clearly be impossible to apply the Federal Act and restrict the liability of the interstate employer to the actual pecuniary loss sustained by the beneficiaries, where the other defendants are liable as for grief and mental suffering, for punitive damages, or for the full value of the life of the deceased without deduction for necessary or other personal expenses of deceased had he lived.

Much more might be said regarding the "injustice and confusion" which would result from a joint action against several defendants where, as in the case at bar, there is a charge against one of violation of the Safety Appliance Act of Congress. The individual defendant had no duty or obligation in regard to the maintenance of the safety appliance, but his co-defendant, the railway company, had, and if a failure to comply with the Safety Appliance Act contributed to the injury in any respect, whether the failure was due to negligence on the part of the railway company or not, the individual defendant is made liable with the railway company for the whole damage if they are suable as joint trespassers.

> "Disregard of the Safety Appliance Act is a wrongful act; and where it results in damage to one of the class for whose especial benefit it was enacted, the right to recover damages from the party in default is implied: Ubi jus ibi remedium."
>
> Texas & Pac. Ry. Co. vs. Rigsby, 241 U. S., 33 (1).

> "Under the Safety Appliance Act, if the equipment was defective or out of repair, the question of whether it was attributable to the Company's negligence or not is immaterial."
>
> Spokane & I. E. R. R. Co. vs. Campbell, 241 U. S., 497.

To permit the joinder of joint trespassers in such cases where the Safety Appliance Acts are involved (as in the case at bar) is to subject the co-defendants to liability without possibility of defense if they are guilty of any concurrent negligence, and renders them liable for the greatest damage of the most guilty although as between themselves and the plaintff they may have defenses which would prevent any recovery against them.

"A statute which subjects one man's property to be affected by, charged, or forefeited for the acts of another, on ground of public policy, should be strictly construed; it can not be done by implication."

2 Lewis Sutherland, Statutory Construction, Section 547, p. 1020.

The railway company is denied the right to plead contributory negligence or assumption of risk on the part of the injured employe where the Safety Appliance Act is violated, and hence the individual co-defendant is thereby effectively cut off from any defense of contributory negligence on the part of the plaintiff, because under the Georgia law "where several trespassers are sued jointly the plaintiff may recover against all damages for the greatest injury done by either." As the Supreme Court of Georgia said in this case:

"If the carirer and its engineer were jointly liable under the conditions stated in the second question a joint judgment would result against them, and they would be equally bound regardless of the fact that the duties imposed upon them are not the same. The jury would have no power in such a case to specify the particular damage to be recovered of each, since Civil Code, Sec. 4512, is not applicable to personal torts."

Lee vs. Central of Ga. Ry. Co., et al., 147 Ga., 428, 431. (Record, p. 64).

The case at bar affords a convincing illustration of the injustice resulting from joinder of defendants, to which the Supreme Court of Georgia had reference. If the allegations of plaintiff's petition are true, the Railway defendant is liable as in case of negligence **per se** for a violation of the Safety Appliance Act of Congress. The utmost diligence of the Railway to maintain the appliance in good condition

would not relieve it from liability; and no degree of contributory negligence on the part of plaintiff could be urged to diminish or curtail his recovery. If joinder of the defendant O'Donnell as a joint tort feasor with the Railway is permitted, he would be equally bound with the corporate defendant under a single judgment for the violation of the Safety Appliance Act. This is what the Supreme Court of Georgia had in mind when it said "the duties imposed upon them are not the same."

No case has ever been decided in Georgia contrary to the decision in the case at bar.

(2) **The decision of the State Supreme Court in the case at bar does not discriminate against the interstate employe.**

The attention of this Court has doubtless been attracted to the contention of petitioner's counsel, often repeated in their brief, that because petitioner was an interstate employe he was denied the right of joinder accorded to all other litigants in Georgia. This statement appears in various forms, and the argument is made that the Georgia courts have "discriminated against petitioner because he was an interstate employe." There is no foundation in fact for this statement or for the argument of counsel that the State Court has discriminated against petitioner as an interstate employe. The reasons given and the authorities cited by the Supreme Court of Georgia in support of its opinion clearly refute the statement and the argument of discrimination. We assert with confidence that no Georgia case has ever laid down a contrary rule of practice or has ever upheld the joinder of defendants where one was liable under a Federal statute and one under the common law or statute law of the State. No case in Georgia has ever upheld a joinder of defendants even under the State Employers' Liability

Act. On the contrary, the only decision under the State Act denied the joinder, and is cited by the Supreme Court of Georgia in the case at bar. (W. & A. R. R. et al. vs. Smith, 144 Ga., 737).

Counsel for plaintiff also argue that the decision of the State Court so construes the Federal Act as to deprive an interstate employe of rights against all others than his Federal employer. But this argument is a fallacy. It confuses the question of right of action or liability with the question of remedy. If the plaintiff has a right of action against the individual defendant, he might have asserted it in a separate proceeding. The State Supreme Court did not deny to plaintiff the right to proceed separately against the Railway Company under the Federal Act or against O'Donnell, the individual defendant, under the State law; it merely refused to entertain his action against the Federal employer jointly with one who was not the employer. The Federal Employers' Liability Act gives no right to the injured employe to sue the employer jointly with other tort feasors. Hence it is clear that the plaintiff could not demand this privilege in the State Court as a matter of right under the Federal Act. A State Court may not refuse to entertain an action by the employe against the employer under the Federal Act, but certainly it may decline to permit that which the Federal Act itself does not require—the joinder of the employer with one who does not sustain that relation to the plaintiff. In the Second Employers' Liability Cases, this Court, while holding that the State Court could not decline to entertain an action under the Act of Congress, clearly stated that it was not thereby intended to regulate State practice or procedure:

> "• • • we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of State courts or to control or affect their modes of procedure, but only a ques-

tion of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the Act of Congress and susceptible of adjudication according to the prevailing rules of procedure."

Second Employers' Liability Cases, 223 U. S., 1, 56, 57.

The second ground of the plaintiff's petition for certiorari filed in this Court is as follows:

"2d. The decision of the Georgia Court is of far-reaching effect in that it depriyes the interstate employes of the right which all courts, including the courts of Georgia, accord to other litigants of joining as defendants in one action all tort feasors whose concurrent negligence have injured him.

"A striking illustration of this inconsistency and injustice is found in the present record. The complaint is in two counts. The first is based upon the Federal Act. (p. 3 of record). The second is based upon the State Liability Act. (p. 5 of record). No complaint of misjoinder was made or adjudicated as to the second count, so that if petitioner had been injured while engaged in intrastate commerce he might, without challenge, have maintained his action against both respondents."

(Petition for writ of certiorari, p. 3).

Reference to the record in this case will show that this statement is entirely erroneous. Both defendants demurred to the petition as a whole (which included the two counts)

for misjoinder. See paragraph 3 of the Railway Company's demurrer, record p. 43; and paragraph 4 of O'Donnell's demurrer, record p. 45. In the trial Court, plaintiff expressly abandoned the second count of the petition, which was based on the State law (see recital in charge of the Court, record p. 52; also specification 1 in bill of exceptions, record p. 70). Therefore, the Court of Appeals could not and did not pass upon the question of misjoinder of defendants under the second count. The case was tried in the lower Court and decided in the Court of Appeals solely upon the first count which was based on the Federal Act. The opinion of the Court of Appeals recites these facts:

> "The defendants admitted in their amended answers that the plaintiff was injured while employed by the railway company in interstate commerce. Thereupon the plaintiff expressly abandoned the second count of the petition and the case proceeded to trial solely upon the first count, which was founded upon the Federal Employers' Liability Act." (Record, p. 65).

There was clearly no discrimination by the State Court against the interstate employe, because the State Supreme Court had distinctly held in a prior case under the State Employers' Liability Act that there was a misjoinder of defendants where the plaintiffs sought to join as a defendant with the employer one who did not sustain that relation to the plaintiff. W. & A. R. R. vs. Smith, 144 Ga., 737 (2). The Supreme Court of the State cited and followed this prior decision in the case at bar. (Record, p. 63; Lee vs. Central of Georgia Railway Company, 147 Ga., 428, 431).

The Smith case, supra, was the first decision of the Supreme Court of Georgia involving the question of joinder of defendants under the State Employers' Liability Act (Acts of Georgia, 1909, p. 160; Georgia Civil Code, 1910, Sec.

2782 et seq.); and the case at bar is the only other decision by that Court involving a similar question since the Federal Liability Act was passed.

If, under the Georgia practice, it is not permissible to join the employer and other tort feasors under the State Act, (as the Supreme Court has clearly decided in the Smith case), **a fortiori** it would be equally inadmissible under the practice of this State to join an employer liable under the Federal law with a tort feasor liable under the State law. If there is misjoinder where both defendants are liable under the laws of the same jurisdiction, there are stronger reasons for holding that there is misjoinder where one defendant is liable under the Federal Acts and the other under the State law. Such is the case at bar, and we therefore earnestly maintain that the Smith case, being the unanimous decision of the Court of last resort in Georgia, definitely settled this question of procedure under the State Employers' Liability Act, and the decision in the case at bar was the logical and consistent consequence of that prior decision when the question of practice was presented in a case under the Federal Act.

Counsel for plaintiff contend that the State Supreme Court in the Smith case did not hold that there was a misjoinder of defendants under the State Employers'Liability Act; and also that the Court erroneously cited and applied that case to the case at bar. These contentions, however, are entirely without foundation. That the Smith case (144 Ga., 737) did involve a misjoinder of defendants under the State Employers' Liability Act is plainly apparent. This is also the construction given to that decision by the State Court of Appeals when the case came before it on a second appeal. The Court of Appeals then said:

> "The action was brought under the Civil Code (1910), Sec. 2782 et seq. The deceased was employed by the Southern Railway Company. The Western &

Atlantic Railroad Company was made a joint defendant upon the theory that its negligence concurred in causing decedent's death. The defendants filed demurrers, which were overruled, and the case was taken to the Supreme Court, and it was decided that, the case having been **brought under the State 'Employers' Liability Act,' the action was demurrable at the instance of each of the defendants, for misjoinder of parties defendant,** and at the instance of the Western & Atlantic Railroad Company for misjoinder of parties plaintiff." (Heavy type ours.)

Smith vs. W. & A. R. R., 22 Ga. App., 437.

It is true that the Supreme Court in the case at bar inadvertently referred to the Smith case as an action by an employe whereas it was in fact an action by the parents of a deceased employe for his homicide. But this is of no consequence because the State Employers' Liability Act expressly gives a right of action to the parents or beneficiaries in cases of homicide, where no administrator has been appointed, and the rule regarding joinder of defendants in actions thereunder is necessarily the same whether the suit is by the employe for his injuries or by the parents or beneficiaries of the employe in case of his homicide. The mere fact that the State Supreme Court referred to the Smith case, sufficiently shows that it did involve a misjoinder of defendants, otherwise the citation would have had no application to the case at bar.

It is the well established rule in several of the States that a joint action will not lie against master and servant for negligence. It is said:

"The reason is that joint tort feasorship in cases of negligence necessarily implies a community of interest in the object and purposes of the undertaking and an equal

right to govern and direct the conduct of each other in respect thereto, and master and servant cannot be said to be engaged in a common enterprise because that relation is inconsistent with the relation of master and servant. Hence the rule."

Hobbs vs. Hurley (Me.) 104 Atl. Rep., 815.

The same rule prevails in Massachusetts, Connecticut, Pennsylvania, and Ohio.

Mulchey vs. Methodist Religious Soc. 125 Mass., 487.
Bailey vs. Bussing, 37 Conn., 349.
Betcher vs. McChesney, 255 Pa., 394. (100 Atl. Rep. 124).
Robbins vs. Pa. R. R., 245 Fed., 435.

It would scarcely be contended that an employe could, as a matter of right in an action under the Federal Employers' Liability Act in those States, maintain a joint action against the interstate master and another servant; and for like reasons the plaintiff's claim to such joint judgment in the case at bar must be denied, because the Supreme Court of Georgia (and the State Court of Appeals by direction of the Supreme Court) has decided that in such an action there is a misjoinder of defendants and of causes of action—that the master and the servant, the defendants in the case at bar, did not owe the same duty to the plaintiff, and accordingly it is decided by the Supreme Court of Georgia that "where there is no joint duty, there can be no joinder" (Record p. 68). And moreover, that Court, as already shown, had previously applied the same ruling to a case arising under the State Employers' Liability Act (W. & A. R. R. vs. Smith, supra), so that no foundation whatever exists for the plaintiff's contention that because he was a Federal employe, the State Court has discriminated in refusing

to allow him to proceed with an action brought jointly against the Federal employer and another wherein he seeks to subject both defendants to a single joint judgment for the greatest damage done by either.

Counsel for petitioner erroneously assume that the common law right to joint tort feasors has not been affected by the Employers' Liability Acts. We concede, of course, that the Georgia Courts in common with others have often upheld a joint right of action against tort feasors; but we deny that the Supreme Court of the State has ever held that the employe may join the master and co-employes as defendants under either the Federal or State Employers' Liability Act.

There are convincing reasons why an employe has not the right to join his employer with other defendants and proceed as in case of joint tort feasors under the Employers' Liability Acts. These statutes create new and plenary causes of action in favor of the employe. His rights are enlarged and amply protected by this legislation; whereas the employer is cut off from rights and defenses which it previously might have urged. Contributory negligence does not bar a recovery. Plaintiff may recover for his employer's negligence, although he may have been guilty of more negligence than the employer. If there is a violation of any statute enacted for the safety of employes, the master is liable for full damages and can not plead assumption of risk or contributory negligence.

> "It is a statute which permits recovery in cases where recovery could not be had before, and takes from the defendant defenses which formerly were available * * * It introduced a new policy and quite radically changed the existing law."
>
> Winfree vs. N. P. R. R., 227 U. S., 296, 302.

> "When the act is analyzed, it becomes apparent that it was the purpose of the Congress to confer rights and

benefits upon the injured employe which were denied him by the common law; and hence the existence of a common law right of action on the part of an injured employe cannot, in reason, be claimed in the presence of this Act of Congress."

Cound vs. A. T. & S. F. Ry. Co., 173 Fed. 527, 531.

Counsel for the plaintiff strongly rely upon Southern Railway vs. Miller, 1 Ga. App., 616 (s. c., 217 U. S., 209). But that case was not based upon either the Federal or State Liability Act. It was decided before Congress "took control of the liability of carriers in interstate transportation by rail to employes injured in interstate commerce." (S. A. L. Ry. vs. Horton, 233 U. S., 492); and counsel for Plaintiff have ignored the controlling question which arises in the case at bar, namely: How can the exclusive control of Congress over such liability exist if a State may, by virtue of its local statutes, impose a joint liability upon and authorize a single joint judgment against the interstate carriers and others as joint tort feasors and provide for contribution between the co-defendants? (Civil Code of 1910, Secs. 4512, 4513). It is evident that the Miller case, supra, would have been differently decided by the Court of Appeals of Georgia if the Federal Employers' Liability Act had been in existence at that time and the action against the railroad defendant had been founded thereon.

That the Federal Act does operate to destroy previously existing common law rights is well illustrated in a case where a father's common law right of action for loss of service of his minor son was declared not to exist since the passage of the Federal Employers' Liability Act. In that case it was said:

"The Court of Errors and Appeals ruled, and it is now maintained, that the right of action asserted by

the father existed at common law and was not taken away by the Federal Employers' Liability Act. But the contrary view, we think, is clearly settled by our recent opinions in New York Central R. R. Co. vs. Winfield, ante, 147, and Erie Railroad Co. vs. Winfield, ante, 170."

New York Central R. R. Co. vs. Tonsellito, 244 U. S., 360, 361.

In view of these authorities the fact that the common law right of joinder which previously existed is denied in an action under the Federal Act, affords no ground for the plaintiff's contention of discrimination against him as an interstate employe. There is no conflict or inconsistency in the decisions of the Georgia Court on the question of joinder under either the Federal or State Liability Act. The right asserted is denied in both cases. But it is clear that whatever might have been decided as to the State Act, the right to join defendants as tort feasors does not exist under the Federal Liability Act.

II.

THE WEIGHT OF AUTHORITY IS AGAINST THE JOINDER OF DEFENDANTS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

The petition for certiorari in the case at bar urged as one of the grounds for issuing the writ that the decisions of the Courts in the various States were in conflict on the question of joinder, and cited the case of Doyle vs. St. Paul Union Depot Company et al., 134 Minn., 461 (159 N. W. Rep., 1081). No other case arising under the Federal Employers' Liability Act was mentioned by plaintiff as being in conflict with the decision of the Supreme Court of Georgia on this question. An examination of the opinion in the Doyle case, supra, will show that it is not even a persuasive authority in favor of

the right here claimed by the plaintiff to a joint judgment against the interstate employer and a co-employe as joint tort feasors, because: (a) It appears in the Doyle case that there was no objection raised to joinder of defendants, the demurrer was solely upon the ground of misjoinder of causes of action. The right to join causes of action was fixed by the Minnesota statute and the Court held it was sufficient to sustain the plaintiff's action. (b) The wide difference between the Minnesota practice and the Georgia practice in actions against joint trespassers obviously prevents any argument that the Doyle case conflicts with the case at bar. Under the practice in Minnesota the jury may return a verdict in different amounts against the several defendants sued as joint trespassers. This was expressly so stated by the Court in the Doyle case:

> "That the measure and amount of recovery against different defendants may be different, and in supposable cases they might be, is not important. If the defendants are liable in different amount, their different liabilities can be found and declared. See Rauma vs. Lamont, 82 Minn., 477, 85 N. W., 236."
>
> Ibidem, 159 N. W. Rep., p. 1082.

In the case at bar, on the contrary, the Georgia procedure and the statute under which the joinder was made provide a directly oposite rule:

> "Where several trespassers are sued jointly, the plaintiff may recover against all damages for the greatest injury done by either * * *"
>
> Ga. Civil Code of 1910, Sec. 4512.

Under the Georgia law the jury trying the case can not apportion the damages betwen the defendants in cases against joint trespassers. Lee vs. Central of Ga. Ry. Co., 147

Ga., 428, 431. The important distinction is, therefore, that a defendant Federal employer in a suit against it as one of several joint trespassers under the Georgia statute is bound to respond in damages for the greatest injury done by either one of its joint tort feasors, and the Federal Employers' Liability Act, instead of being exclusive as Congress intended, is completely set aside by the State law. In other words, if the plaintiff's contention prevails, the Georgia statutes fixing the damages against all the joint trespassers according to the greatest injury done by either and providing for contribution between the defendants, is the law which will really govern the case and not the Federal Employers' Liability Act which should, by reason of its supremacy, control the ultimate liability of the Federal employer.

For the foregoing reasons it is conceivable that in Minnesota a defendant employer liable under the Federal Act might possibly be joined with other defendants and the damages so apportioned as not to affect the liability of the interstate employer under the National statute. Even this seems doubtful. However, it is important to observe that in the Minnesota case the Supreme Court of that State merely followed its own prior opinions, construing the common law regarding joinder, in cases decided long before the passage of the Federal Employers' Liability Act. The Court did not consider the question how far the common law right to join joint trespassers was affected by that Act, or whether such right can be said to exist at all in view of the exclusive and inclusive character of the Federal statute.

A further important distinction between the Doyle case and the case at bar, which should not be overlooked, is that the former did not involve the Safety Appliance Act of Congress. In the case at bar, the Railway defendant, if guilty of violating the Safety Appliance Act as charged, would be liable for full damages without considering the

question of its negligence or diligence. The jury, under the Georgia procedure, being required in case of concurrent negligence to return a joint verdict for one sum against both defendants "for the greatest injury done by either," the individual defendant is also made liable, as if guilty of negligence per se, for his co-defendant's violation of the Safety Appliance Act. So that joinder of defendants, under the facts in this record, would be not only contrary to the scope and purpose of the Federal Employers' Act, but of the Safety Appliance Act as well. It would at the same time extend the exacting liability imposed by these statutes to co-employes and other joint trespassers in a manner which certainly was not intended by Congress when they were enacted.

The Court of Appeals of Kentucky, in a similar case, where co-employes were joined as defendants with the interstate carrier, held that dismissal of the action as to the individual defendants was required where plaintiff elected to proceed under the Federal Employers' Liability Act. In so deciding that Court used the following language which may appropriately be applied to the case at bar:

> "(2) After the Court had properly required the plaintiff to elect whether he would proceed under the Federal Act or the State law, and he had elected to proceed under the former, it necessarily followed that the action must be dismissed as against the two individual defendants, who were the co-employes of appellant, for the Federal Act provided only for recovery by employes against a 'common carrier by railroad while engaged in commerce between any of the several States,' and nowhere, either expressly or by inference, provides for a recovery by one employe against his co-employes. To have overruled this motion, after the election to pro-

ceed under the Federal Act, would have left pending one action under the Federal Act against the carrier, and another under the State law against the individual defendants."

Thompson vs. C. N. O. & T. P. Ry., et al. (Ky.), 176 S. W. Rep., 1006, 1008.

In the case at bar, it will be recalled, plaintiff elected to proceed under the Federal Act. He abandoned the second count of the petition which was based upon the State law. (See opinion of the Court below, Record, p. 65).

In another case a District Court of the United States decided that an individual could not be joined as a defendant with the interstate carrier:

"A master mechanic employed by an interstate railroad company cannot be made liable for the death of an engineer, under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65); liability under such act being limited to common carriers engaged in interstate commerce."

Kelly's Admx. vs. C. & O. Ry. Co., et al., 201 Fed. Rep., 602 (1).

The same conclusion was reached in the Northern District of Georgia, where the Court, referring to the joinder of the individual defendant with the railway company, said:

"It is perfectly manifest that Avery is not liable under this act, as the act aplies only, by its terms, to 'common carriers by railroad while engaged in commerce between any of the several States,' etc."

Taylor vs. Southern Railway Co., 178 Fed. Rep., 380, 381.

To the same effect, see also:

Roberts Injuries to Interstate Employes, Sec. 145.
Richey Fed. Emp. L. Act (2nd Ed.) Sec. 128.

Instead of conflict of authority on this subject, as the petition for certiorari contends, there is practically complete accord that the joinder of co-employes as defendants with the interstate employer is not permissible under the Federal Act.

III.

THE DECISION OF THE HIGHEST COURT OF THE STATE THAT THE DEFENDANTS COULD NOT BE SUED JOINTLY AS TORT FEASORS IN THE STATE COURT IS CONCLUSIVE OF THE QUESTION.

It cannot be doubted that the State has power to regulate the remedy and modes of administering justice in its courts, and to establish rules of practice and procedure in cases within its jurisdiction. The question as to who are properly joined as parties to a suit for negligence must necessarily be determined by the law of the forum.

"Each State may, subject to the limitations of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversy which shall be heard in them. * * *"

St. Louis & Iron Mountain Railway vs. Taylor, 210 U. S., 281, 285.

"There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings,

rules of evidence, and the Statute of Limitations—depend upon the law of the place where the suit is brought."

Central Vt. Ry. vs. White, 238 U. S., 507, 511.

"In an action brought in a State Court under the Employers' Liability Act, questions of procedure and evidence are to be determined according to the law of the forum; • • •"

C. & O. Ry. Co. vs. Kelly, 241 U. S., 485.

"Whether the State Court has obeyed a local rule of practice requiring the substitution of correct instructions for defective ones requested, is a question of State law not reviewable by this Court in an action under the Employers' Liability Act."

L. & N. R. R. vs. Holloway, 246 U. S., 525 (3).

"Where an action under the Federal Employers' Liability Act is tried in a State Court, local rules of practice are applicable. • • •"

C. & O. Ry. vs. DeAtley, 241 U. S. 311 (5).

And this is so because

" • • • the State law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

John vs. Paullin, 231 U. S., 583, 585.

In a case where a majority verdict in a State Court was upheld in an action under the Federal Employers' Liability Act, this Court said:

> "While a State Court may enforce a right created by a Federal statute, such court does not, while performing that duty, derive its authority as a court from the United States but from the State, and the Seventh Amendment does not apply to it."
>
> Minn. & St. Louis R. R. vs. Bombolis, 241 U. S., 211 (5).

The State Supreme Court and the State Court of Appeals in the case at bar held that under the State practice and procedure, joinder of the defendant O'Donnell with the railway company employer was improper and directed that the demurrers for misjoinder of parties and causes of action be sustained. In so deciding, the highest Court of the State said:

> "In such a case the rules of law applicable to the several defendants are not the same. To join defendants in one suit, they must owe the same duty. 38 Cyc. 483. Where there is no joint duty there can be no joinder. 29 Cyc. 565, note 71." (Record, pages 63, 68, 69).

That it was competent for the State Court to finally decide this question of State practice and that this Court will accept the ruling of the highest Court of the State as conclusive on the subject is plainly asserted in many removal cases. We quote from some of these decisions:

> "A State has an unquestionable right by its Constitution and laws to regulate actions for negligence, and

where it has provided that the plaintiff may proceed jointly or severally against those liable," • • •

the Federal Removal Statute cannot make it a separable controversy.

C. N. O. & T. P. R. R. vs. Bohon, 200 U. S., 221, 226.

"Whether defendants can be sued jointly as tort feasors is for the State Court to decide; • • •"

I. C. R. R. vs. Sheegog, 215 U. S., 308 (5).

"• • • it stands decided that in Kentucky the facts alleged and proved against the Illinois Central Railroad in this case made its lessor jointly liable as matter of law. This decision we are bound to respect."

Ib. p. 318.

"Whether there was a joint liability of defendants sued jointly for negligence is a matter of State law and this Court will not go behind the decision of the highest Court of the State to which the question can go."

C. R. I. & P. vs. Schwyhart, 227 U. S., 184 (1).

"If the State Court so decides, a plaintiff may join joint tort feasors even though the liability of one is statutory and the liability of the other rests on the common law."

C. R. I. & P. Ry. vs. Dowell, 229 U. S., 102 (5).

It is settled beyond controversy by these decisions that "whether defendants can be sued jointly as tort feasors is for the State Court to decide," and where that Court holds

the joinder is proper, its decision is binding on this Court. The converse of the proposition must also be considered as settled, namely, where the highest State Court decides that a plaintiff may not, under the local practice, join tort feasors as co-defendants in an action for negligence, the decision is likewise conclusive of the question. Such is the status of the case at bar. Neither expressly nor by inference does the Federal Employers' Liability Act authorize the injured employe to sue a co-employe. It does not purport to give a joint right of action against the Federal employer and other joint tort feasors. On the contrary, the object of this national legislation, which was to make uniform the liability of interstate carriers, excludes any idea that is was intended to confer such joint right of action. There being, therefore, no infraction of any right secured to the plaintiff under the Federal Act, this Court will accept as conclusive the decision of the highest Court of the State that there was a misjoinder of defendants and of causes of action in this case.

The decision of the Supreme Court of Georgia expresses the well-considered judgment of that Court. Its opinion was rendered in response to questions certified to it by the State Court of Appeals. After it had answered the questions so certified, the plaintiff applied to the State Supreme Court for a rehearing which was denied. (Lee vs. Central of Georgia Railway, 147 Ga., 248). When the case was again decided by the State Court of Appeals (Record, p. 74), the Supreme Court of the State denied an application for a writ of certiorari (Record, p. 75).

We earnestly contend, for the reasons herein set forth, that the question of joinder of defendant and of causes of action in the case at bar was rightly decided by the State Supreme Court and is in accordance with its established practice. Moreover, since it concerns merely a local rule of practice and violates no Federal right to which plaintiff was

entitled, this Court will not consider or determine whether the views of the State Court in this respect accord with its own.

> "This Court, ordinarily, will not inquire whether the decision upon matter not subject to its revision was right or wrong."
>
> Arkansas Southern Railway Co. vs. Germania National Bank, 207 U. S., 270.

The decision of the State Supreme Court, so far at least as any joint action against the individual defendant is concerned, must be final and conclusive on this question. The attempted joinder of the defendant O'Donnell in this case involved his rights and defenses as well as those of the interstate railroad carrier. Would it be competent for this Court, even if it should entertain a different view from the State Supreme Court, to reverse the judgment below with direction which would have the effect to subject the individual defendant to a **joint judgment** with the railway company? The co-employe is not made liable either jointly or severally to the injured empolye under the Federal Act. The liability of the individual defendant in the case at bar, if any exists, arises solely under the State law, as construed by the State Supreme Court. How then would it be competent for this Court to declare, in opposition to the decision of the State Supreme Court, that he should have been **jointly bound** with the raiwlay company in this action?

In the improbable event that this Court should now conclude that the employer might be joined with one or several joint trespassers in an action under the National statute—that a **joint liability** of the Federal employer with co-trespassers "for the greatest injury done by either" is consistent with the object and purpose of the Federal Employers' Liability Act—even so, under the State practice as declared by

the Supreme Court of Georgia, it would still not be permissible for the plaintiff to subject the individual co-defendant to a joint judgment in this State Court action. Since the Federal statute does not require such joinder it is clear that the question of misjoinder, **as to the individual defendant at least,** is a matter of State pleading and practice on which the decision of the State Supreme Court is binding upon this Court.

> Central Vermont Ry. Co. vs. White, 238 U. S., 507, 513.

The judgment of the Court below is that there was "a misjoinder of parties defendant and a misjoinder of causes of action." (Record, pp. 69, 74).

This, we submit, was a question of State practice and procedure for final determination by the Supreme Court of Georgia alone, that is, whether O'Donnell, a citizens of Georgia, against whom liability was asserted solely under the State law, could be subjected to a joint judgment in an action in the State Court, as co-defendant with the railway company, against whom liability was claimed only under the Federal statutes. We also confidently maintain that the State Supreme Court properly, and for sound reasons, decided against the plaintiff's claim to a joint action in the case at bar, and that the judgment of the Court below should be affirmed.

Respectfully submitted,

T. M. CUNNINGHAM, JR.,
H. W. JOHNSON,
Attorneys for Respondents.

LEE v. CENTRAL OF GEORGIA RAILWAY COMPANY ET AL.

CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

No. 150. Argued January 16, 1920.—Decided March 1, 1920.

A rule of state pleading and practice, applied without discrimination to cases of personal injury arising under the federal and state employers' liability laws, which prevents an injured employee from suing jointly, in a single count, the railroad company under the federal statute and a co-employee at common law, does not infringe any right of such plaintiff derived from the federal statute. P. 110.

21 Ga. App. 558, affirmed.

THE case is stated in the opinion.

Mr. Alexander A. Lawrence, with whom *Mr. Wm. W. Osborne* was on the briefs, for petitioner.

Mr. H. W. Johnson, with whom *Mr. T. M. Cunningham, Jr.*, was on the brief, for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

An injured employee brought an action in a state court of Georgia jointly against a railroad and its engineer, and sought in a single count, which alleged concurring negligence, to recover damages from the company under the Federal Employers' Liability Act, and from the individual defendant under the common law. Each defendant filed a special demurrer on the ground of misjoinder of causes of action and misjoinder of parties defendant. The de-

murrers were overruled by the trial court. The Court of Appeals—an intermediate appellate court to which the case went on exceptions—certified to the Supreme Court of the State the question whether such joinder was permissible. It answered in the negative (147 Georgia, 428). Thereupon the Court of Appeals reversed the judgment of the trial court (21 Ga. App. 558); and certiorari to the Supreme Court of the State was refused. The plaintiff then applied to this court for a writ of certiorari on the ground that he had been denied rights conferred by federal law; and the writ was granted.

Whether two causes of action may be joined in a single count or whether two persons may be sued in a single count are matters of pleading and practice relating solely to the form of the remedy. When they arise in state courts the final determination of such matters ordinarily rests with the state tribunals, even if the rights there being enforced are created by federal law. *John* v. *Paullin*, 231 U. S. 583; *Nevada-California-Oregon Railway* v. *Burrus*, 244 U. S. 103. This has been specifically held in cases arising under the Federal Employers' Liability Act. *Minneapolis & St. Louis R. R. Co.* v. *Bombolis*, 241 U. S. 211; *Atlantic Coast Line R. R. Co.* v. *Mims*, 242 U. S. 532; *Louisville & Nashville R. R. Co.* v. *Holloway*, 246 U. S. 525. It is only when matters nominally of procedure are actually matters of substance which affect a federal right, that the decision of the state court therein becomes subject to review by this court. *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507; *New Orleans & Northeastern R. R. Co.* v. *Harris*, 247 U. S. 367.

The Federal Employers' Liability Act does not modify in any respect rights of employees against one another existing at common law. To deny to a plaintiff the right to join in one count a cause against another employee with a cause of action against the employer, in no way abridges any substantive right of the plaintiff against the

employer. The argument that plaintiff has been discriminated against because he is an interstate employee is answered, if answer be necessary, by the fact that the Supreme Court of Georgia had applied the same rule in *Western & Atlantic R. R. Co.* v. *Smith*, 144 Georgia, 737 (22 Ga. App. 437), where it refused under the State Employers' Liability Act to permit the plaintiff to join with the employer another railroad whose concurrent negligence was alleged to have contributed in producing the injury complained of. If the Supreme Court of Georgia had in this case permitted the joinder, we might have been required to determine whether, in view of the practice prevailing in Georgia, such decision would not impair the employer's opportunity to make the defences to which it is entitled by the federal law. For, as stated by its Supreme Court in this case (147 Georgia, 428, 431): "If the carrier and its engineer were jointly liable under the conditions stated in the second question, a joint judgment would result against them, and they would be equally bound, regardless of the fact that the duties imposed upon them are not the same. The jury would have no power in such a case to specify the particular damages to be recovered of each, since Civil Code, § 4512 [providing for verdicts in different amounts against the several defendants] is not applicable to personal torts."

But we have no occasion to consider this question. Refusal to permit the joinder did not deny any right of plaintiff conferred by federal law. Cases upon which petitioner most strongly relies, *Southern Ry. Co.* v. *Carson*, 194 U. S. 136; *Alabama Great Southern Ry. Co.* v. *Thompson*, 200 U. S. 206; *Southern Ry. Co.* v. *Miller*, 217 U. S. 209, are inapplicable to the situation at bar.

Affirmed.